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IN THE

Supreme Court of the United States

RONALD ZIMMERMAN AND
STEFFI ZIMMERMAN, PETITIONERS

v.

CITY OF OAKLAND; LEONARD WHITE, SERGEANT;
BILLY TAYLOR; OAKLAND TOW CAR
ASSOCIATION; A&B AUTO; AND
KEN BETTS' TOWING

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Petition be granted to clarify whether an individual's right to due process before being deprived of a property interest by an administrative determination includes the right to a hearing before someone other than the person or persons who was responsible for the initial determination that the property right should be taken away?

2. Should the Petition be granted because the Court of Appeals' decision directly conflicts with this Court's precedents and the decisions of other Courts of Appeals establishing that the availability of a postdeprivation remedy does not cure any violation of due process that occurs during a pre-deprivation administrative proceeding involving the seizure of property?

3. Should the Petition be granted because the Court of Appeals affirmed the District Court's erroneous application of the standard of review applicable to summary judgment motions?

4 Should the petition be granted to consider whether rules prohibiting citation of unpublished appellate opinions violate the constitutional rights of litigants like the Zimmermans by allowing courts to promulgate rules of law with selective prospectivity, acting as a prior restraint on free speech, and denying litigants their due process rights?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners in this action are Ronald Zimmerman and Steffi Zimmerman. Petitioners were Plaintiffs-Appellants in the Ninth Circuit Court of Appeals.

Jim Hines and Jim Hines Foundation, a non-profit California corporation were Plaintiffs-Appellants in the first appeal to the Ninth Circuit Court of Appeals reported at 255 F.3d 734 (2001), but are not participants in this petition.

Respondents

The Respondents are City of Oakland, Sergeant Leonard White, Billy Taylor, Oakland Tow Car Association, A&B Auto, and Ken Betts' Towing. Respondents were Defendants-Appellees in the Ninth Circuit Court of Appeals.

The Oakland City Counsel, its former Mayor Elihu Harris, and members of the City Council, Jane Brunner, John A. Russo, Nancy J. Nadel, Dick Spees, Nate Miley, Larry Reid, Ignacio De La Fuente, and Henry Chang, Jr. were sued both individually and in their official capacities and appeared as Defendants-Respondents in the first appeal. The District Court required that Plaintiffs-Petitioners dismiss the City Council, Mayor Harris and the individual council members with the filing of the Second Amended Complaint.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("*Zimmerman II*") is unpublished. (App.p.1a - 5a.) The previous opinion of the United States Court of Appeals for the Ninth Circuit in this case ("*Zimmerman I*") is reported in the official federal case reporter at 255 F.3d 734. (App.p.6a - 17a.) The decision of the United States District Court for the Northern District of California is unpublished. (App.p.26a - 45a.)

JURISDICTION

The United States District Court for the Northern District of California exercised federal question jurisdiction in this case under 28 U.S.C. § 1331. The United States Court of Appeals for the Ninth Circuit had jurisdiction to hear the appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The Court of Appeals entered a final decision in this case on February 23, 2004. (App.p.1a -5a.) The Court of Appeals entered an order denying the Petition for Rehearing on March 22, 2004. (App.p.87a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arose from the actions of Respondent the City of Oakland, California (the "City") and the City's Towing contractor, the Oakland Tow Car Association ("OTCA"), and its member contractors A&B Auto, Billy

Taylor, and Ken Betts' Towing ("Towing Defendants") in depriving Petitioners Ronald and Steffi Zimmerman ("the Zimmermans") of their Fourteenth Amendment due process rights through the unreasonable and unjustified enforcement of an inapplicable municipal abatement ordinance. The ordinance remains in effect.[1]

A. The Zimmermans Stored a Reconditioned Transit Bus on Their Property

In 1998, the Zimmermans owned a piece of real property located in Oakland, California. (E.R. 381.) The property, which was used by its previous owner to store and repair vehicles, was zoned for light industrial uses, including automotive repair and maintenance, fee parking, automotive cleaning, and manufacturing services. (E.R. 381-82.) The dispute giving rise to this litigation centers on a reconditioned transit bus the Zimmermans were storing on the property. (E.R. 381-82.) The Zimmermans leased a portion of the property for truck repair and automotive repairs, but the bus, which was a 1966 GM transit bus, was parked on a portion of the property that was reserved for the Zimmermans' own use and not leased to anyone. (E.R. 382.) Mr. Zimmerman made extensive repairs to the bus over the years. (E.R. 382-83.) Mr. Jim Montano

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[1] The City's Vehicle Abatement Program contract with the Defendant - Respondent Oakland Tow Car Association for towing services is described in an article appearing in the Oakland Tribune, June 24, 2001 by Robert Gannon. The contract generates considerable revenue to private contractors. The article estimates that about 30,000 cars, vans and pick-up trucks pass through the gates of the Defendant - Respondent A&B Auto each year, all towed at the City's request. The area where these vehicles are stored is a sprawling land area six blocks long and five blocks wide. The article estimates that in one year the City's contract generated at least $6.5 million dollars in gross revenue to the owner of A&B Auto. (E.R. 472 et seq.)

("Montano"), the mechanic who serviced the bus for its previous owners, also serviced it for the Zimmermans. (E.R. 483.) Far from being wrecked, abandoned, dismantled or inoperative, the bus was "in particularly good mechanical condition." (E.R. 483-84.)

B. The Bus Was Made Available Without Charge For Use By A Local Charity That Provided Sports-Related Activities For Youths

The Zimmermans made the bus available without charge for use by the Jim Hines Foundation, a non-profit charitable organization that provided sports-related activities for Oakland area children. (E.R. 382.) The headquarters of the Jim Hines Foundation was also located on the Zimmermans' property. (E.R. 382.)

C. Officers From the City's Vehicle Abatement Unit, Supervised by White, Entered the Zimmermans' Property and Tagged the Bus for Abatement

Respondent Leonard White ("White") was the police officer in charge of both the City's Traffic Division and its sub-unit, the Vehicle Abatement Unit, which is responsible for the removal of abandoned, wrecked, dismantled, or mechanically inoperable vehicles under the City's Vehicle Abatement Ordinance ("VAO"). (E.R. 665, 669.) On or about March 3, 1998, White and persons under his supervision entered the Zimmerman property without a warrant to inspect for vehicles subject to removal under the VAO. (E.R. 384; 726.) White did not investigate the zoning on the Zimmerman property to determine the allowable uses and was unaware that the property could be used to store vehicles for repair and service. (E.R. 436.) The Zimmermans did not consent to or request this entry by the City's police department. (E.R. 385.) White was

accompanied by several police technicians, including Officer Mark Thomas, who assisted in the "tagging" of vehicles for removal. (E.R. 726.) The bus, along with several other vehicles and items, was tagged with a notice which provides in pertinent part that: "[N]o vehicle shall be parked on private property, public property or on roadway for more than 72 hours in an inoperable condition, if it is visible to others." (E.R. 393.)

D. The City Mailed the Zimmermans an Abatement Notice

On or about April 2, 1998, the City mailed the Zimmermans a Notice of Intention to Abate stating that the city considered the transit bus to be a public nuisance and would seize it in ten days unless the offending condition was corrected. (E.R. 385.) The notice did not specify what condition required corrective action to avoid abatement. The notice did not allege that the bus was either inoperable, wrecked, dismantled, or abandoned as is required by the state Vehicle Code. It did specify a date by which the unspecified "condition" must be corrected on penalty of having the bus seized and scrapped. (E.R. 393.)

Following receipt of the notice, Mr. Zimmerman contacted the Vehicle Abatement Unit to learn why the bus was tagged. (E.R. 384-85.) Mr. Zimmerman spoke to PST Jeffery Haymon, who erroneously advised him to request a hearing if he wished to learn why the bus was tagged. Relying on this advice, Mr. Zimmerman requested a hearing. (E.R. 385.) The Zimmermans subsequently received a notice in the mail from the Vehicle Abatement Unit informing them that the hearing was set for April 23, 1998, at 1:00 p.m. (E.R. 385.)Contrary to Haymon's advice, the City does not grant informational hearings.

E. White, Who Led the Team That Initially Tagged the Bus, Conducted a Hearing to Determine Whether the Bus Would be Seized

On April 23, 1998, White appeared at the Zimmerman property to conduct the hearing, having been appointed as the hearing officer by the Chief of Police under the terms of the City's Abatement Ordinance. (E.R. 385, 674.) White was accompanied, by other City officers, including a deputy city attorney, as well as representatives from several towing companies under contract to the City. (E.R. 385). White proceeded to open the hearing and to identify himself as the hearing officer. (E.R. 385) White walked about the Zimmerman property and proceeded to conduct a second search for additional vehicles to be abated, while purportedly serving in the simultaneous role of "neutral trier of fact." (E.R. 385-86) White directed those present to seize vehicles that were previously tagged and tagged more vehicles. (E.R. 389.) The City's videotape of the proceedings is remarkable in that while the so-called "hearing" lasted two hours, the tape is only one hour long. (E.R. 389.)

F. No Testimony was Taken at the "Hearing," and White Served Simultaneously as Police Officer Enforcing the Abatement Ordinance and Neutral Trier of Fact

White also acted as a witness at the hearing. Although he claimed at his deposition to have no recollection of being on the Zimmerman property on March 3, 1998 when the bus was originally tagged, he says he was there and remembers the tagging of the bus on the official videotape of the "hearing." (E.R. 386-87.) When Mr. Zimmerman objected to White's efforts to seize a tagged vehicle parked on his property, White called for a police car and threatened to arrest

Mr. Zimmerman. (E.R. 388.) When White examined the bus during the hearing, he merely walked around its exterior, commented that it was missing headlights and a bumper, and noted that it did not appear to be registered because there was no license plate.[2] White then told the other City officials to "take it." (E.R. 386.)

White took no testimony about the bus, and he did not ask Mr. Zimmerman whether the bus was operable, why the headlights had been removed, or whether a bus normally has fenders, and he did not inspect the interior of the bus. (E.R. 386.) As the summary judgment evidence indicated, Montano, the mechanic, was in the process of replacing the headlights on the day of the hearing, and the bus was properly parked on the property awaiting repairs under the M-20 zoning. (E.R. 484.) Mr. Zimmerman and Montano both indicated that on the date of the hearing, the bus was not mechanically inoperable. (E.R. 384, 483-84.) Indeed, the bus had a new engine, a new battery, and was routinely driven on the Zimmerman property to insure that it was operational. (E.R. 382-84, 483-84.)

G. The Bus was Seized by the City

White incorrectly told the Zimmermans that his decision was final, and none of the City officials present told the Zimmermans that they had any right to appeal. (E.R. 389.) The bus was then towed off the property by Ken Betts' Towing pursuant to a contract between the OTCA and the City. Respondent Billy Taylor is the President of the OTCA and owner of A&B Auto. (E.R. 784.) The bus was stored at A&B Auto which is a member contractor to the OTCA . While stored it was severely vandalized. It remained on the A&B property

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[2] The City's Abatement Ordinance does not regulate unregistered vehicles. (E.R. 336.)

until it was purportedly sold by Taylor to a third party. (E.R. 411.)

H. The Zimmermans Attempted to Recover the Bus and Asked for a Hearing Before the City Council, but These Requests Were Denied

Before the vehicle was sold, the Zimmermans attempted to have a further hearing before the City. The City denied a hearing, but offered to return the bus on condition that the towing and storage charges be paid to A&B Auto. The City flatly refused to eliminate the payment of towing or storage charges and refused to pay for the damage done to the bus. The City's contract with the OTCA prohibits the imposition of towing and storage charges where vehicles are erroneously towed. (E.R. 588.) The Zimmermans refused to pay these illegitimate charges. (E.R. 388.) Contrary to the conclusion reached by the Court of Appeals in its decision, the Zimmermans made repeated requests for a hearing before the City Council on the abatement of the bus, but those requests were refused. (E.R. 388.)

I. The Zimmermans Filed Suit Against the City and White for Due Process Violations.

The Zimmermans filed their original complaint in the United States District Court for the Northern District of California. (E.R. 820.) The Hines Foundation and Olympic Gold Medal winner Jim Hines were plaintiffs in the case along with Petitioners. The City Council, including Nancy J. Nadel were also named as defendants along with the City. A First Amended Complaint was filed on October 2, 1998. (E.R. 820.) In their complaint, the Zimmermans alleged, that without taking any testimony, making any factual determinations, or making any findings, White improperly ordered the bus seized. (App.p.8a (Zimm I

opinion).) The Zimmermans alleged, *inter alia*, that the seizure violated their right to due process of law, and they asserted claims under 42 U.S.C. section 1983. (App.p.8a, 9a (Zimmerman I opinion).)

J. The Court of Appeals, in *Zimmerman I*, Rejected the City's Arguments and Remanded the Case for Further Determinations.

On October 22, 1998, the City and other defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), and the District Court dismissed the complaint. (E.R. 822.) The Zimmermans appealed the dismissal to the Court of Appeals, which reversed in part and affirmed. (E.R. 825; App.p.17a.) The Court of Appeals remanded the case for a determination of whether the City's notice and hearing procedures denied the Zimmermans due process of law. In reaching this determination, the Court of Appeals rejected the City's contention that the Zimmermans were barred from contending that they were denied due process because a post-deprivation hearing was available. (App.p.3a..)

After remand, the Zimmermans moved to file a Second Amended Complaint adding the towing companies as additional defendants. (E.R. 826.) The District Court allowed the amendment but eliminated the individual city council members as defendants in the case. On the City's second motion to dismiss, the District Court dismissed the Zimmermans' cause of action against the City Defendants for denial of due process relative to the City's notices ostensibly issued under the VAO. (App.p.69a.)The District Court also dismissed the Jim Hines Foundation, Jim Hines and Mrs. Ronald Zimmerman as lacking a sufficient interest in the transit bus to enable them to sue. The District

Court later reconsidered its decision regarding Mrs. Zimmerman, and reinstated her as a plaintiff. (App.p.48a.)City Defendants and the Towing Defendants filed motions for summary judgment and the District Court granted the motions on December 3, 2002, and judgment against the Zimmermans was then entered. (E.R. 834.) The Zimmermans alone then appealed the District Court's order. (E.R. 810, 838.)

K. In *Zimmerman II*, the Court of Appeals Ignored the Law of the Case and Affirmed the District Court's Entry of Judgment Against the Zimmermans.

The Court of Appeals affirmed the District Court's judgment in its entirety. With respect to the Zimmermans' claim that their due process rights were violated in the "hearing" conducted by White,- the Court of Appeal concluded that because the Zimmermans had an opportunity to be heard, their due process rights were not violated. (App.p.3a.) The Court of Appeals also rejected Zimmerman's arguments on the grounds that "even if the first hearing had violated due process," because a post-deprivation hearing was also available, Zimmerman was barred from complaining about the hearing conducted by White. (App.p.3a.) This conclusion directly contradicted the determination made by the Court of Appeals in its earlier published decision.

REASONS FOR GRANTING THE PETITION

POINT I THE PETITION SHOULD BE GRANTED TO ADDRESS WHETHER A PERSON'S RIGHT TO DUE PROCESS BEFORE BEING DEPRIVED OF A PROPERTY INTEREST BY AN ADMINISTRATIVE DETERMINATION INCLUDES THE RIGHT TO A HEARING BEFORE SOMEONE OTHER THAN THE PERSON OR PERSONS WHO MADE THE INITIAL DETERMINATION THAT THE PROPERTY RIGHT SHOULD BE TAKEN AWAY

As this Court has indicated, at the very core of due process is the right to a fair hearing conducted by an impartial tribunal.[3] In *Withrow v. Larkin*, 421 U.S. 35 (1975), this Court established that, generally, an administrative agency may combine investigative and adjudicative functions without infringing on a party's due process rights. But this Court has not clearly established whether, as in this case, an administrative decision-maker may be involved in the review of his or her own decision without violating a party's due process rights under the Fourteenth Amendment. Given that the lower courts have reached inconsistent conclusions regarding this issue, the Petition should be granted to clarify what role, consistent with due process, an initial decision-maker may play in reviewing his or her own preliminary determination.

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[3] It is undisputed that the loss of the use and enjoyment of a vehicle deprives the owner of an interest that may be taken only after providing due process of law in accordance with the Due Process Clause. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1342 (9th Cir. 1977); *Harris v. County of Riverside*, 904 F2d 497, 503 (9th Cir. 1990).

A. This Court has Indicated That Having an Administrative Decision-Maker Review His or Her Own Previous Decision May Violate a Party's Due Process Rights.

In *Withrow*, the Court reviewed the actions of a medical examining board that first conducted an investigative hearing to determine if a doctor had engaged in certain proscribed acts. The same board later conducted a contested hearing to determine whether the physician's license to practice medicine should have been revoked. The Court rejected the contention that "the combination of investigative and adjudicative functions necessarily created unconstitutional risk of bias in administrative adjudication . . .." *Withrow*, 421 U.S. at 47. Instead, the Court concluded that a party alleging bias "must overcome a presumption of honesty and integrity in those serving as adjudicators" and establish that "conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden" to guarantee that due process rights are protected. *Id.* In reaching this conclusion, the Court noted that in situations where actual bias did play a role, a party's due process rights would be at risk. *Id.* In *Withrow*, the Court did not directly address whether the person who made the initial determination may, consistent with due process, participate in the administrative review of the initial decision.

The Court, however, in a footnote, recognized a distinction between the commingling of functions by different individuals within one agency and the evaluation by a decision-maker of his or her own prior decision. The Court noted that "if the initial view of the facts based on the evidence derived from

nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Withrow*, 421 U.S. at 58. In the footnote supporting this statement, the Court cited cases holding "that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review." *Withrow*, 421 U.S. at 58 n. 25. The cases referenced in this footnote addressed the mandatory hearing required prior to revocation of probation when the initial recommendation has been made by the defendant's probation officer. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). The Court has reached similar conclusions in other cases.

For instance, officials who make final determinations about whether welfare beneficiaries have lost eligibility for benefits may not have participated in the initial determinations of ineligibility. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The Court has also held that a prisoner's complaint that a letter was wrongly censored must be reviewed by a prison official other than the person who originally disapproved the correspondence. *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989). Similarly, a member of the prison disciplinary board that determines whether to reduce a prisoner's good-time credits may not be a witness or participate in a case as an investigating or reviewing officer. *Wolff v. McDonnell*, 418 U.S. 539, 571, 573 n. 20 (1974). These decisions recognize that, as a general proposition, the evaluation by a decision-maker of his or

her own prior decision infringes on a party's due process rights.

B. Because Lower Courts Have Reached Inconsistent Conclusions, This Court's Guidance is Needed to Address the Propriety of a Decision-maker Reviewing His or Her Own Decision

Despite this Court's indication that a person who makes the initial decision to deprive a party of property rights should not participate in a review of that decision, the lower courts, including the Court of Appeals in this case, have reached inconsistent results in cases involving similar scenarios. In its opinion, the Court of Appeals rejected the Zimmermans' contention that because White was involved in the initial decision to tag the bus (and was in charge of the City agency dealing with abatements), their due process rights were violated when White conducted the "hearing" regarding whether that initial decision would be upheld. The Court of Appeals simply concluded that because the Zimmermans did receive a hearing, that was sufficient to protect their due process rights. (App.p.3a.)[4] Other decisions have similarly held that a party's due process rights are not necessarily affected if the person making an initial determination participates in review of that decision. *See, e.g. Morris v. City of Danville*, 744 F.2d 1041, 1046 (4th Cir. 1984) (rejecting contention that by virtue of his prior participation in

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[4] The District Judge in this case expressed concerns about White acting both as the police officer in charge of the unit that issued the citation and the hearing officer in the Zimmermans' appeal. (Transcript of Hearing, November 8, 2002 at 4.) The District Judge believed, however, that "the case law indicates that an investigator and a hearing officer can be the same person." (Transcript of Hearing, November 8, 2002 at 5.)

proceedings leading to plaintiff's discharge, official was constitutionally disqualified to participate in further proceedings). Both the Ninth Circuit's decision in this case and the Fourth Circuit's ruling in *Morris* appear to be premised on an interpretation of *Withrow* that requires a showing of actual bias to raise a due process issue.

But other courts have concluded that under *Withrow*, an administrative decision-maker may not, consistent with due process, participate in reviewing the decision-maker's initial determination. The Ninth Circuit itself has previously recognized that such a dual role can deprive a party of due process. *See, e.g. Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991) (allowing the same person to serve both as decision-maker and as advocate for the party that benefitted from the decision violated due process); *American Gen. Ins. Co. v. Federal Trade Comm'n*, 589 F.2d 462, 464-65 (9th Cir.1979) (due process violated where attorney functioned as counsel for one party in a federal court proceeding and later served as decisionmaker in an administrative proceeding involving same parties and same underlying issue); *see also Stivers v. Pierce*, 71 F.3d 732, (9th Cir. 1995) (when one member of three-member panel biased, decision must be set aside because proceeding violates due process). Similarly, the Seventh Circuit has acknowledged that an administrative decision-maker should not be involved in reviewing his or her initial decision. In *White v. Ind. Parole Bd.*, 266 F.3d 759 (7th Cir.2001), the court concluded that a prison guard who prepared a report charging an inmate with a disciplinary violation "could not have been given a vote on the [Conduct Adjustment] Board" that decided whether the inmate would lose good-time credits because of the charge.

White, 266 F.3d at 767. Other courts have held that "the government official charged with recommending a particular decision must not participate in making the actual decision, and the official who makes an initial decision must not participate in making the final decision." *Butler v. Oak Creek-Franklin School District*, 172 F . Supp.2d 1102, 1115 (E.D. Wis. 2001), *citing Withrow*, 421 U.S. at 53-55. Given these inconsistent interpretations of *Withrow* and the propriety of an initial decision-maker being involved in reviewing his or her initial determination, the Petition should be granted to clarify this area of the law.

POINT II THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE DECISIONS OF OTHER COURTS OF APPEALS ESTABLISHING THAT THE AVAILABILITY OF A POSTDEPRIVATION REMEDY DOES NOT CURE ANY VIOLATION OF DUE PROCESS THAT OCCURS DURING A PREDEPRIVATION ADMINISTRATIVE PROCEEDING INVOLVING THE SEIZURE OF PROPERTY

In *Zinermon v. Burch*, 494 U.S. 113 (1990), this Court established that in situations involving the seizure of property under a statutory scheme, the availability of a postdeprivation remedy does not preclude a party from asserting that his or her due process rights were violated by the seizure. The Court of Appeals initially followed *Zinermon* in *Zimmerman I* but, in *Zimmerman II*, the Court of Appeals ignored *Zinermon* and the law of the case by concluding that the availability of a postdeprivation remedy precluded the Zimmermans from asserting that their due process rights were violated. Because the decision in

Zimmerman II directly conflicts with this Court's precedents and the decisions of other Courts of Appeals, the Petition should be granted.

A. In *Zinermon*, This Court Established That the Availability of a Postdeprivation Remedy Does not Automatically Cure a Due Process Violation When the State is Able to Implement Predeprivation Procedural Safeguards

This Court has established that the availability of a postdeprivation remedy does not cure any due process violation that may have taken place before a party was deprived of property. In *Zinermon v. Burch*, 494 U.S. 113 (1990), a former "voluntary" patient of a Florida state mental hospital brought a section 1983 procedural due process claim alleging that physicians and administrators of the mental facility violated state law by admitting him as a "voluntary" mental patient when they knew or should have known that he was incompetent to give his informed consent. The plaintiff asserted that the defendants' failure to initiate Florida's involuntary placement procedure denied him constitutionally guaranteed procedural safeguards. The lower courts dismissed the plaintiff's claim, relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). Those decisions established that a deprivation of a constitutionally protected property interest caused by a state employee's "random" and "unauthorized" conduct does not give rise to a section 1983 procedural due process claim unless the state fails to provide a post deprivation remedy.

In *Zinermon*, this Court held that under some circumstances, a plaintiff can state a procedural due process claim under section 1983 despite the availability

of postdeprivation state remedies. The Court noted that while, in most cases, a state must provide some kind of hearing before it deprives a person of liberty or property, this requirement can be waived if such predeprivation process would be "impracticable" or where the state must necessarily act quickly. In such situations, courts have "held that a statutory provision for a postdeprivation hearing, or a common law tort remedy for erroneous deprivation, satisfies due process." *Id.* For instance, in *Parratt* and *Hudson*, the Court concluded that as long as those remedies were adequate, the plaintiffs were being afforded all the process that was due them and therefore could not allege an actionable claim under section 1983. *Parratt*, 451 U.S. at 541-42; *Hudson*, 468 U.S. 531-32. In *Zinermon*, the Court limited *Parratt* and *Hudson* by noting that the rules established in those cases depended on whether the state could implement predeprivation safeguards. When postdeprivation remedies are "the only remedies the State could be expected to provide," such remedies are sufficient to preclude any due process claim. *Zinermon*, 494 U.S. at 128. But, under *Zinermon*, when the state, as a practical matter, is able to create procedural safeguards before a deprivation takes place, the availability of postdeprivation remedies does not preclude a due process claim.

B. The Ninth Circuit in *Zimmerman I* Followed *Zinermon* in Concluding That the Availability of Postdeprivation Remedies does not Preclude a Due Process Claim

In *Zimmerman I*, the Court of Appeals properly applied the law and concluded that the availability of postdeprivation remedies does not prevent parties like the Zimmermans from alleging that they were deprived

of due process. During the first appeal of this case, the Court of Appeals addressed the City's contention that there was no due process violation because the state provided an adequate post-deprivation remedy. The court in *Zimmerman I* held that neither *Parratt v. Taylor*, 451 U.S. 527 (1981), nor *Hudson v. Palmer*, 468 U.S. 517 (1984), precluded a due process challenge to the adequacy of procedures under which the City removed the bus. The *Zimmerman I* court held

> We believe that our case is governed by *Zinermon*, rather than *Parratt* and *Hudson*. First, the deprivation in this case took place at a "specific, predictable point in the process" – when Sergeant White came out to the Zimmermans' property and conducted the hearing about which Plaintiffs complain. Second, it is not "absurd" in this case to suggest that Oakland should hold a hearing to determine whether Plaintiffs should be deprived of their property. Indeed, the Oakland ordinance under which Sergeant White acted prescribes precisely such a hearing. Third, Sergeant White, like the defendants in *Zinermon*, was "delegated . . . the power and authority to effect the very deprivation complained of" and had "the concomitant duty to initiate the procedural safeguards set up [under the Oakland ordinance] to guard against [the] unlawful [deprivation]." We therefore conclude that *Parratt* and *Hudson* do not protect the "he ring" conducted by

> Sergeant White from constitutional challenge.

Zimmerman I, 255 F.3d at 739. The Court of Appeals remanded the case for consideration of the Zimmermans' due process claims without regard to the availability of a postdeprivation remedy. In *Zimmerman II*, it failed to acknowledge this Court's decision in *Zinermon* *supra* and even its own decision in *Zimmerman I*. Because the Court of Appeals' decision in *Zimmerman II* directly conflicts with this Court's precedents and the decisions of other courts (including the Ninth Circuit in *Zimmerman I*), the Petition should be granted.

Point III. The Petition Should be Granted to Exercise This Court's Supervisory Power by Correcting the Court of Appeals' Departure From the Normal Course of Procedures Regarding Summary Judgment in Refusing to Properly Apply the Summary Judgment Standards Established by This Court.

The Petition should also be granted to correct the Court of Appeals' clear departure from the applicable summary judgment standards. This Court should exercise its supervisory power to correct the Court of Appeals' departure from accepted practice in affirming the entry of summary judgment in favor of the City Defendants and Towing Defendants. The District Court denied the Zimmermans the protections required to be afforded a party responding to a motion for summary judgment under Federal Rule of Civil Procedure 56, by improperly applying the evidentiary standards in concluding there were no triable issues of fact. In improperly interpreting and applying the rule, the

District Court foreordained the result in this case without a trial and in contravention of the spirit and letter of the Federal Rules.

A. Summary Judgment Should Not be Granted Where Genuine Issues of Material Fact Exist

Summary judgment is not to be "used to deprive a litigant of a full trial of genuine fact issues." 10A Wright & Miller, *Federal Practice and Procedure 2d* § 2712 (1998). In an early decision interpreting the summary judgment rule, the Fifth Circuit opined that

> summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940). This Court, in its more recent decisions interpreting the rule, has explained that summary judgment is not a substitute for trial. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or a motion for directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party responding to a motion for summary judgment must be given a meaningful opportunity to respond and to

combat the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (Rule 56 must be construed with due regard for a party bringing the motion and for the rights of persons asserting defenses "adequately based in fact to have those claims and defenses tried to a jury"). Here, the District Court applied the summary judgment standard inversely. When it could draw inferences in the Zimmermans' favor, it did the opposite. Where defendants admitted a fact, the Court required the Zimmermans to prove it. Where there was no other factual conclusion to be drawn, the Court manufactured a justification for its own contrary conclusions. Given the importance of summary judgment procedures, the Petition should be granted to clarify the proper standards to be applied.

B. The Court of Appeals Deliberately Misinterpreted the Applicable Summary Judgment Rules to Conclude That any Error by the District Court was Irrelevant to the Issues Being Presented.

In its decision, the Court of Appeals rejected the Zimmermans' contention that the District Court improperly applied the summary judgment standard. In addressing the Zimmermans' arguments, the Court of Appeals stated as follows:

> Zimmerman's contention that the district court incorrectly applied the summary judgment standard is without merit. He suggests that there is a disputed issue of material fact regarding the condition of the bus that is sufficient to preclude summary judgment. If the district court had been hearing a summary judgment motion as to whether the bus was

> properly abatable, these arguments would be important. But the district court here was not ruling on the merits of the abatement case, it was ruling on whether the hearing satisfied due process.

(App.p.3a.) The Court of Appeals, in essence, concluded that the evidence proffered by the Zimmermans in opposition to the summary judgment motions was irrelevant to the issues being considered by the District Court. This was entirely incorrect. In fact, the Record contains evidence sufficient to preclude any determination that the "hearing" conducted by White was, as a matter of law, sufficient to afford the Zimmermans due process.

Furthermore, there were credibility issues raised by White's denial in his declaration of his presence on the property while admitting at the hearing that he was in fact present. (E.R. 386-87) These credibility issues were not suitable for resolution on summary judgment. *See Agosto v. INS*, 436 U.S. 748, 756 (1978). In addition, it is undisputed that White never issued a written decision, never took testimony, did not make any findings, and did not explain the basis for his decision. These issues of fact were relevant to the question of whether the hearing was consistent with the requirements of due process and should not have been decided on summary judgment. By asserting that the evidence presented by the Zimmermans was not relevant to the due process inquiry, the Court of Appeals avoided any careful examination of the District Court's implementation of this Court's summary judgment standards. Given the importance of the summary judgment process in federal court proceedings, this Court should correct the District

Court's marked departure from the Federal Rules by granting this Petition.

POINT IV THE PETITION SHOULD BE GRANTED TO CONSIDER WHETHER RULES PROHIBITING CITATION OF UNPUBLISHED APPELLATE OPINIONS VIOLATE THE CONSTITUTIONAL RIGHTS OF LITIGANTS LIKE THE ZIMMERMANS

Nearly all the federal appellate courts and most state appellate courts have rules regarding the precedential effect of unpublished decisions. As the internet and computerized research services make more officially-unpublished decisions available, courts and commentators have begun to address the constitutional implications of rules that prohibit litigants from citing or even talking about thousands of appellate decisions. By using publication and no-citation rules, courts have been granted the power to determine whether their decisions in particular cases will have any precedential value, which is inconsistent with this Court's decisions prohibiting selective prospectivity. The no-citation rules also infringe on litigants' First Amendment free speech rights and due process rights. The Court of Appeals' unpublished decision in this case is a prime example of the dangers and difficulties generated by rules that prohibit the citation of unpublished opinions, and the Petition should be granted to consider these issues.

A. Because Most State and Federal Appellate Courts Have Rules Forbidding the Citation of Unpublished Decisions, the Issue is of Great Significance

Court rules prohibiting the citation of unpublished opinions are in widespread use in both the state and federal court systems. In the federal system, nearly four out of five decisions of the United States Courts of

Appeals are unpublished.[5] In some federal circuits, unpublished opinions may only be cited in the same or related cases for limited purposes.[6] In other circuits, unpublished opinions may be cited but are not considered binding precedent.[7] Few states allow litigants to cite unpublished opinions as persuasive authority.[8] Nearly thirty states prohibit citation of unpublished appellate opinions or consider such opinions to be of little persuasive value.[9] Because this practice is so widespread, it presents an issue of great national significance.

B. Ninth Circuit Rule 36-3 Prohibits the Citation of Unpublished Opinions Like the Decision in This Case, Which Conflicts With the Law of the Case and This Court's Precedents

The decision in *Zimmerman II* was ordered not to be published by the Court of Appeals under the authority of Circuit Rule 36-3. Circuit Rule 36-3(a)

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[5] Deborah Jones Merritt and James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 72 (2001), *citing* Judicial Business of the United States Courts: 1999 Annual Report of the Director at 49 tbl. S-3 (2000).

[6] *See* 2d Cir. R 0.23; 7th Cir. R 53(b)(2)(iv); 9th Cir. R. 36-3(b); Fed Cir. R. 47.6(b).

[7] *See* 1st Cir. R. 32.3(a)(2); 4th Cir. R. 36(c); 5th Cir. R. 47.5.4; 6th Cir. R. 28(g); 8th Cir. R 28A(i); 10th Cir. R. 36.3.; 11th Cir. R. 36-2, 36-3; D.C. Cir. R. 28(c)(12)(B); *see also* 3rd Cir. Int. Op. Proc. 5.8 (court will not cite unpublished opinions).

[8] *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Proc. 251, 261-75 (2001).

[9] *See* Serfass & Cranford, *supra* at 258-75; *see also* Tex. R. App. P 47.7; *Grand Co. v. Rogers*, 44 P.3d 734, 738 (Utah 2002) (striking down no-citation rule); *Walker v. Doe*, 558 S.E.2d 290, 296 (W. Va. 2001) (allowing citation of per curiam opinions).

provides that unpublished decisions "are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel." Ninth Circuit Rule 36-3(a). Unpublished decisions, like the decision in *Zimmerman II*, "may not be cited to or by the courts of this circuit" except in limited circumstances. Ninth Circuit Rule 36-3(b). The Court of Appeals' decision not to publish *Zimmerman II* was particularly significant given that *Zimmerman II* conflicts with rulings made in the previous published decision in *Zimmerman I* as well as decisions of this Court.[10]

C. The Petition Should be Granted to Address Whether No-Citation Rules Violate This Court's Decision in *James B. Beam Distilling Co. v. Georgia* Prohibiting Selective Prospectivity Because an Unpublished, Uncitable Decision Allows a Court to Create a New Rule of Law That is Only Applicable to a Single Case and Litigant

The Petition should be granted to consider whether rules like Circuit Rule 36-3(b) are unconstitutional because they allow courts to engage in selective prospectivity, which is prohibited under this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

Selective prospectivity occurs when a court overrules a precedent but only applies the new rule to

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[10] It is noteworthy that 9th Circuit Judge A. Wallace Tashima, who participated in *Zimmerman II*, is supportive of U.S. Judicial Advisory Committee's recommendation to change court rules to make it easier to cite unpublished opinions. See article, Legal Times, "Judicial Conference Group Backs Citing of Unpublished Opinions", April 15, 2004.

the case in which it is announced, reverting to the previous precedent for other cases that predate the new decision. *James B. Beam*, 501 U.S. at 534-37. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court previously "abandoned the possibility of selective prospectivity in the criminal context . . .." *James B. Beam*, 501 U.S. at 538. In *James B. Beam*, the Court extended that principle to civil cases, noting that the "equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere." *James B. Beam*, 501 U.S. at 540 (citation omitted). In reaching this conclusion, this Court stated that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at 544.[11] In *Anastasoff*, the court noted that when a rule prohibits citing unpublished opinions, courts "are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and what's more, you cannot even tell us what we did yesterday." *Anastasoff*, 223 F.3d at 904. Courts issuing unpublished decisions that cannot be cited are effectively applying one rule to litigants in one case while prohibiting litigants in a later case from even citing that rule as part of an effort to have the same rule applied.

In this case, the Court of Appeals' decision reflects such selective prospectivity and goes so far as to overrule the law of the case *sub silentio* in doing so. In

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[11] In his concurrence, Justice Scalia concluded that "selective prospectivity" was impermissible under the Constitution. *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring).

Zimmerman I, the Court of Appeals held that, as a matter of law, the availability of postdeprivation proceedings did not preclude the Zimmermans from asserting their section 1983 procedural due process claims. In the unpublished decision in *Zimmerman II*, however, the Court of Appeals stated that "moreover, even if the first hearing had violated due process, a post-deprivation hearing was available to Zimmerman, but he declined to pursue it." (App.p.3a.) By ordering that the decision affirming the judgment against the Zimmermans not be published, the Court of Appeals took that decision out of the line of precedent and ignored its own previous decision in the same case. The Court of Appeals was able to do so, without creating a conflict in Ninth Circuit precedent, because the holding in *Zimmerman II* applied to the Zimmermans and no one else. Because the Court of Appeals' rules prohibiting the citation of unpublished opinions create the very selective prospectivity disapproved by this Court, the Petition should be granted.

D. The Petition Should be Granted Because No-Citation Rules Violate Litigants' First Amendment and Due Process Rights

The Petition should also be granted because no-citation rules like Circuit Rule 36-3(b) infringe on the free speech and due process rights like the Zimmermans.

The Petition should be granted to determine whether non-publication rules like Circuit Rule 36-3(b) constitute content-based prior restraints on speech. The no-citation rule is not content neutral because it identifies particular expressive content, that is, unpublished decisions of the Court of Appeals, and prohibits attorneys and litigants from citing or discussing those opinions in that same court. The First

Amendment protects against prior restraints on the content of speech. *See New York Times Co. v. United States*, 403 U.S. 713 (1971); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Near v. Minnesota*, 283 U.S. 697 (1931). The Zimmermans, as litigants in a federal court, are prohibited from citing any Ninth Circuit unpublished opinions and are therefore subject to this prior restraint. This Court has previously recognized, in another context, that laws restricting the arguments that may be raised in court or limiting the analysis that courts may consider can be impermissible restrictions on free speech. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). The Petition should be granted to address whether the widespread practice of prohibiting litigants like the Zimmermans from citing a large body of authority constitutes an impermissible prior restraint.

The Petition should also be granted to review whether rules like Circuit Rule 36-3(b) deny litigants their due-process rights. Given the large body of case law that no-citation rules declare "off limits," such rules affect a litigant's right to due process. Whether an opinion really has precedential value often cannot be predicted by the panel or the parties to the actual case, and litigants in subsequent cases have no recourse even if they find the decision helpful. Thus, litigants sometimes find that the only appellate decision or decisions supporting an argument they wish to make are unpublished and cannot be cited, leaving them with the difficult task of persuading an appellate court to accept a particular rationale without any supporting authority.

Clearly the decision here conflicts with *Zimmerman I* and other decisions. By invoking non-publication rules, intermediate appellate courts can

establish that a decision is only important to the litigants of that case and not to future litigants, effectively giving the intermediate appellate courts power over this Court's docket. Because these rules prohibit litigants from invoking prior unpublished decisions and adversely affect their access to further appellate review, the Court should grant the Petition and determine whether such rules violate litigants' due-process rights.

CONCLUSION

The issues presented in this Petition are important questions of law involving this Court's Due Process and First Amendment jurisprudence, and the Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

NOT FOR PUBLICATION

No. 03-15067
D.C. No. CV-98-03245-CW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD ZIMMERMAN; et al.,
Plaintiffs-Appellants,

v.

OAKLAND, CITY OF; et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted February 10, 2004
San Francisco, California
Filed February 23, 2004

MEMORANDUM*

Before: GOODWIN, TASHIMA, and CLIFTON, Circuit Judges.

Appellant Ronald Zimmerman's 1962 transit bus was towed and scrapped by the City of Oakland pursuant to a vehicle abatement ordinance. He sued the City of Oakland and Sergeant White ("City defendants") and

Billy Taylor, Oakland Tow Car Association, A&B Auto, and Ken Betts' Towing ("Towing defendants") under multiple theories, including a claim under 42 U.S.C. § 1983 for deprivation of due process. The district court partially granted the City defendants' motion to dismiss, and later granted summary judgment to all defendants. In the course of the litigation, the district court awarded Ken Betts' Towing $10,000 in Rule 11 sanctions against Zimmerman and his attorney, Thomas Ho'okano. Zimmerman appeals the grant of both motions and the sanction award. We affirm the district court in all respects.

Zimmerman claims that two aspects of the abatement proceedings violated his rights of due process. First he challenges the adequacy of the abatement notices that he received, and second, he challenges the adequacy of the hearing after which his bus was actually seized.

As for the sufficiency of the notice, although normally applied with respect to criminal laws, the principle applies with equal force here that a law is vague only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). The notices clearly stated that the City believed the bus to be either or all "inoperable, unregistered, wrecked, dismantled," or "abandoned," and that Zimmerman could avoid abatement by bringing the vehicle into compliance or moving it into an enclosed garage. Even without knowing the precise complaint, any reasonable person would conclude that the City's notice could be countered by a demonstration that the bus was in good, operable condition, or by moving the bus indoors. Instead, Zimmerman did

nothing, and the bus was evidently in the same condition and location at the time of the hearing as when it was initially tagged six weeks earlier.

With respect to the hearing conducted at Zimmerman's property, due process does not require that the "right" outcome be reached, but that the individual have the "opportunity to be heard at a meaningful time and in a meaningful manner." Brock v. Roadway Express, Inc. 481 U.S. 252, 261 (1987). It is a flexible standard, so that no single formula can apply to all hearings. Boddie v. Connecticut, 401 U.S. 371, 378 (1971) ("The formality and procedural requisites for the hearing can vary, depending upon the importance f the interests involved and the nature of the subsequent proceedings."). Zimmerman was afforded an opportunity to be heard. Moreover, even if the first hearing had violated due process, a post-deprivation hearing was available to Zimmerman, but he declined to pursue it.

Zimmerman's contention that the district court incorrectly applied the summary judgment standard is without merit. He suggests that there is a disputed issue of material fact regarding the condition of the bus that is sufficient to preclude summary judgment. If the district court had been hearing a summary judgment motion as to whether the bus was properly abatable, these arguments would be important. But the district court here was not ruling on the merits of the abatement case, it was ruling on whether the hearing satisfied due process. The "actual" condition of the bus is largely irrelevant to that inquiry, so long as the hearing was conducted fairly and Zimmerman had notice and an opportunity to be heard.

When Zimmerman first filed the complaint, it was only against the City defendants and unspecified "Doe defendants." More than three years after the initial complaint (after the statute of limitations had run on all of Zimmerman's theories of liability), Zimmerman filed a Second Amended Complaint that sought to substitute the Towing defendants for the previously denominated Doe defendants pursuant to Cal. Civ. Proc. Code § 474. The district court initially allowed the substitution, but on summary judgment concluded that because Zimmerman knew the identities of Ken Betts' Towing, A&B Auto, Billy Taylor and the facts giving rise to claims against them at the time of the first complaint substitution under § 474 was improper. After concluding that Zimmerman's knowledge prevented tolling of the statute of limitations, the court ruled that claims against these defendants were time-barred. It then granted summary judgment to the Oakland Tow Car Association ("OTCA") on the ground that there is no link between the actions Zimmerman complains of and the Association's contract with the City.

The rulings of the district court are also correct. Zimmerman's deposition clearly shows that he had knowledge of three of the Towing defendants at the time of the incident; when his attorney learned their identities is irrelevant. It is also irrelevant that Zimmerman did not know the details of the City's contract with OTCA. He knew who towed his vehicle and knew that that action was taken at the City's behest. If he had a claim against the Towing defendants, he knew enough at that time to bring it. As for the claims against the OTCA, Zimmerman presents no basis to support an independent claim against that organization.

In appealing the Rule 11 sanction, the appellants misrepresent the reason for the award, arguing that it should be overturned because "the claims [asserted against the Towing defendants] are not frivolous." In fact, they were sanctioned not for making frivolous arguments, but for Mr. Ho'okano's failure to conduct a reasonable investigation of the facts prior to attempting to substitute the Towing defendants. The record makes that failure apparent, and Judge Wilken did not abuse her discretion in issuing the sanction. See G.C. & K.B. Invs., Inc. v. Wilson, 326 F.3d 1096, 1109 (9th Cir. 2003).

The Towing defendants' motion for attorney fees under Federal Rule of Appellate Procedure 38 is denied.

AFFIRMED

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts f this circuit except as provided by Ninth Circuit Rule 36-3.

No. 99-16828

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD ZIMMERMAN; STEFFI ZIMMERMAN; JIM HINES; JIM HINES FOUNDATION, a non-profit California corporation,
Plaintiffs-Appellants

v.

CITY OF OAKLAND; COUNCIL OF OAKLAND; OAKLAND POLICE DEPARTMENT; LEONARD WHITE, Sergeant; JANE BRUNNER, individually and as a member of the Oakland City Council; JOHN A. RUSSO, individually and as a member of the Oakland City Council; NANCY J. NADEL, individually and as a member of the Oakland City Council; DICK SPEES, individually and as a member of the Oakland City Council; IGNACIO DE LA FUENTE, individually and as a member of the Oakland City Council; NATE MILEY, individually and as a member of the Oakland City Council; LARRY REID, individually and as a member of the Oakland City Council; HENRY CHANG, JR., individually and as a member of the Oakland City Council, Defendants-Appellees.

February 15, 2001, Argued and Submitted, San Francisco, California
June 21, 2001, Filed

COUNSEL: Thomas E. Ho'okano, Esq., Law Offices of Thomas E. Ho'okano, San Francisco, California, for the plaintiffs-appellants.

Claudia Leed, Office of the City Attorney, Oakland, California, for the defendants-appellees.

JUDGES: Before: Alfred T. Goodwin, Procter Hug, Jr., and William A. Fletcher, Circuit Judges.

OPINION BY: William A. Fletcher

OPINION:

W. FLETCHER, Circuit Judge:

Ronald Zimmerman, Steffi Zimmerman, Jim Hines, and the Jim Hines Foundation (collectively, "Plaintiffs") appeal the dismissal of their complaint against the City of Oakland and various individuals employed by the city (collectively, "Defendants"). We reverse in part, affirm in part, and remand.

I

According to the complaint, the Zimmermans own property in Oakland that is zoned for light industrial use. The dispute in this case revolves around a reconditioned transit bus stored on that property for the use of the Jim Hines Foundation, a non-profit organization whose office is also located on the property. On March 27, 1998, Sergeant Leonard White and other Oakland police officers entered the property to search for derelict vehicles. The officers tagged several vehicles, including the bus, and mailed the Zimmermans a notice stating that the city considered the vehicles public nuisances and would seize them in ten days.

Following instructions provided in the notice, Mr. Zimmerman requested a pre-seizure hearing, which was scheduled to occur at the Zimmerman property on April 23, 1998. On that date, Sergeant White arrived and announced that he would be the hearing officer. Plaintiffs contend that instead of conducting a hearing, White began a warrantless search of the property and summarily directed that several vehicles (including the bus) be towed and scrapped. In their somewhat prolix complaint, Plaintiffs allege, among other things, that "without taking any testimony . . . making any factual determinations . . . and without making any findings . . . Sergeant White ordered the bus seized. The seizure was not supported by findings as required by law and was totally devoid of substantial evidence to support it." White "never stated the reasons why the vehicles were being seized or how the condition he found objectionable could be cured. He made no findings . . . ." In so doing, White "utterly failed to perform the duties given to him under state and local law." Further," Plaintiff (sic) believes that the actions taken were retaliatory in nature and constitute selective and discriminatory illegal enforcement of the ordinances complained of herein."

Plaintiffs brought suit in federal court under 42 U.S.C. § 1983. Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The district court granted the motion and dismissed the complaint.

Plaintiffs make three arguments on appeal. First, they contend that Defendants violated the Due Process Clause of the Fourteenth Amendment by seizing the

bus in the manner in which they did. Second, they contend that both of the entries onto the property violated the Fourth Amendment. Finally, they contend that the district court improperly denied their motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e).

We review dismissals under Rule 12(b)(6) de novo, accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs. See Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000). Dismissal for failure to state a claim is appropriate if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). We review denials of Rule 59(e) motions for abuse of discretion. See Pasatiempo by Pasatiempo v. Aizawa, 103 F.3d 796, 801 (9th Cir. 1996).

II

Plaintiffs first contend that the seizure of their bus violated the Due Process Clause of the Fourteenth Amendment. They contend that their right to due process was violated because the notice they received from the police department and the hearing conducted by Sergeant White were inadequate. They further contend their due process rights were violated because the ordinance under which the hearing was conducted was unsupported or preempted by state law, and did not apply to the bus.

Defendants argued in the district court, and argue here, that there is no constitutional due process violation because the state has provided adequate postdeprivation remedies under state law for the seizure of the bus. Relying on Parratt v. Taylor, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), and Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), the district court agreed, finding that postdeprivation remedies available under state and city law were constitutionally adequate, and holding that there was therefore no violation of due process.

The district court was correct to rely on Parratt and Hudson for the proposition that, in certain circumstances, a state can cure what would otherwise be an unconstitutional deprivation of "life, liberty or property" by providing adequate postdeprivation remedies. The question, however, is what those circumstances are. The facts of Parratt and Hudson, the Court's explanation in Hudson, and the Court's later holding and explanation in Zinermon v. Burch, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990), assist us in reaching an answer.

The plaintiff in Parratt was a state prisoner. He claimed that he had ordered hobby materials through the mail and that prison officials negligently lost those materials. He brought a constitutional due process suit for damages against prison officials under § 1983 for the value of the materials. See 451 U.S. at 529. In Hudson, the plaintiff was also a state prisoner.

He brought a suit for damages under § 1983 against a correctional officer, claiming that the officer violated his due process rights by intentionally destroying personal

property in his prison cell. See 468 U.S. at 530. The Supreme Court held that neither prisoner had been deprived of due process because in both cases the state had made available adequate postdeprivation remedies under state law.

In Hudson, the Court expanded the holding of Parratt, which concerned negligent deprivations of property, to include intentional deprivations:

> The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned.

468 U.S. at 533. But the Court made it clear that the holdings in both cases were restricted to cases in which the state prison officials acted in random, unpredictable, and unauthorized ways. The Court stated explicitly that postdeprivation remedies could not save an otherwise unconstitutional act from unconstitutionality in cases in which the state officer acted pursuant to some established procedure. It distinguished Parratt and Hudson from Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982), in which it had allowed a constitutional due process challenge to be brought against a state-law procedure even though some postdeprivation remedies were available under state law. According to the Court in Hudson, the critical

distinction was that the plaintiff in Logan, unlike the plaintiffs in Parratt and Hudson, challenged the adequacy of a procedure that had been followed:

In Logan, we decided a question about which our decision in Parratt left little doubt, that is, whether a postdeprivation state remedy satisfies due process where the property deprivation is effected pursuant to an established state procedure. We held that it does not. Logan plainly has no relevance here. Respondent does not even allege that the asserted destruction of his property occurred pursuant to a state procedure.

468 U.S. at 534.

Zinermon v. Burch further clarifies the reach of Hudson and Parratt. The plaintiff in Zinermon alleged that he was confined against his will in a Florida state mental hospital. He contended that the manner in which the state employees admitted him to the hospital, and thereby deprived him of his liberty, violated both state law and federal due process. Relying on Parratt and Hudson, the state defendants contended that plaintiff's complaint failed to state a claim for violation of due process because "it alleged only a random, unauthorized violation of the Florida statutes governing admission of mental patients." 494 U.S. at 115.

The Court in Zinermon rejected the analogy to Parratt and Hudson for three reasons. First, the deprivation of liberty in Zinermon was not unpredictable in the same way the deprivations of property in Parratt and Hudson had been. Unlike Parratt and Hudson, where the state could not "'predict precisely when the loss would occur,'" id. at 136 (quoting Parratt, 451 U.S. at

541), deprivations like the one that took place in Zinermon "would occur, if at all, at a specific, predictable point in the . . . process" -- that is, at the time mental patients were admitted for treatment. Id. Second, in Parratt and Hudson, the "very nature of the deprivation made predeprivation process 'impossible,'" 494 U.S. at 137 (quoting Parratt, 451 U.S. at 541), for it would have been "absurd," or nearly so, "to suggest that the State should hold a hearing" to determine whether a prison official should engage in the conduct charged by the plaintiff. Id. Third, the conduct of the defendants in Zinermon was not "unauthorized" in the same sense as the conduct of the defendants in Parratt and Hudson. In Parratt and Hudson, the defendants lacked "broad authority to deprive prisoners of their personal property." 494 U.S. at 138. In Zinermon, by contrast, Florida had "delegated to the defendants the power and authority to effect the very deprivation complained of and the concomitant duty to initiate the procedural safeguards set up by state law to guard against the unlawful deprivation." Id.

We believe that our case is governed by Zinermon, rather than Parratt and Hudson. First, the deprivation in this case took place at a "specific, predictable point in the process" -- when Sergeant White came out to the Zimmermans' property and conducted the hearing about which Plaintiffs complain. Second, it is not "absurd" in this case to suggest that Oakland should hold a hearing to determine whether Plaintiffs should be deprived of their property. Indeed, the Oakland ordinance under which Sergeant White acted prescribes precisely such a hearing. Third, Sergeant White, like the defendants in Zinermon, was "delegated . . . the power and authority to effect the very

deprivation complained of" and had "the concomitant duty to initiate the procedural safeguards set up under the Oakland ordinance to guard against the unlawful deprivation." We therefore conclude that Parratt and Hudson do not protect the "hearing" conducted by Sergeant White from constitutional challenge.

Our holding in this case is consistent with Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir. 1990), in which we heard a due process challenge to a procedure under which, as here, city officials removed nuisance automobiles from private property. The parties did not argue in Conner that Parratt and Hudson required a different result, and we did not discuss those cases in our opinion. However, the implicit answer we gave in Conner is the same as the explicit answer we give today: Parratt and Hudson did not foreclose a due process challenge to the adequacy of the procedures under which the removal was carried out.

Because the district court relied on Parratt and Hudson to hold that the availability of adequate postdeprivation remedies under state law foreclosed any federal constitutional due process claim, it did not reach the question of whether Defendants' actions, considered without regard to postdeprivation remedies, violated due process. But if, as we hold, Parratt and Hudson are not applicable to this case, that question must be reached. We therefore remand to the district court to determine whether the procedures followed by Defendants in this case violated the Due Process Clause of the Fourteenth Amendment. We intimate no answer to that question in this opinion.

III

Plaintiffs next contend that the Oakland police violated their Fourth Amendment rights by searching the Zimmerman lot on March 27 and April 23, 1998. We hold that Plaintiffs had no legitimate expectation of privacy in the area where the bus was stored. According to Plaintiffs' own complaint, the area where the bus was parked was open to people who wished to transact business with tenants of the lot. Since those tenants included automotive repair shops and pay parking areas, the Zimmermans routinely allowed people unknown to them to visit the area without prior authorization, and they did nothing to prevent those people from seeing the bus.

When a police officer enters a commercial area in the same manner as any member of the public, and examines the area in the same way as might be expected of any other person, the officer has not conducted a "search" within the meaning of the Fourth Amendment. See Katz v. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."); Maisano v. Welcher, 940 F.2d 499, 503 (9th Cir. 1991). Because the police officers in this case entered the Zimmermans' lot in the same manner as a person who had business to transact, we hold that Plaintiffs' expectation of privacy was insufficient to support a Fourth Amendment claim. Our decision in Conner is inapposite because that case involved an enclosed residential lot, not a commercial space open to the public.

IV

Finally, Plaintiffs contend that the district court improperly denied their motion under Federal Rule of Civil Procedure 59(e) to alter or amend its judgment. To the extent that the motion sought to alter or amend the judgment with respect to Plaintiffs' due process claim, the appeal from the district court's denial is moot in light of our holding that Plaintiffs are entitled to proceed with that claim. To the extent, however, that the motion sought to alter or amend the judgment with respect to Plaintiffs' other claims, the appeal is not moot.

Amendment or alteration is appropriate under Rule 59(e) if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. School Dist. No. 1J, Multnomah Cty. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). With respect to the portion of its ruling that is not moot, the district court did not abuse its discretion in denying Plaintiffs' motion to alter or amend its judgment. With one exception, the motion repeated legal arguments made earlier and sought to introduce facts that were available earlier in the proceedings. A district court does not abuse its discretion when it disregards legal arguments made for the first time on a motion to amend, see Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995), and a party that fails to introduce facts in a motion or opposition cannot introduce them later in a motion to amend by claiming that they constitute "newly discovered evidence" unless they were previously unavailable. See Gencorp,

Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999).

The only new argument in Plaintiffs' motion to alter or amend the judgment was a contention that it was "manifestly unjust" for the district court to issue a ruling without first obtaining and reviewing the city's administrative record. Plaintiffs claim that this evidence (in particular, a videotape of the April 23 hearing) would have demonstrated that the property was not the "open lot" that the district court described, but was instead restricted to people with business to transact. This fact would not, however, alter Plaintiffs' expectation of privacy. Accordingly, it was not an abuse of discretion for the district court to deny Plaintiffs' Rule 59(e) motion.

CONCLUSION

Because we believe that Plaintiffs' complaint that Defendants violated their Fourteenth Amendment due process rights states a claim under § 1983, we REVERSE the judgment of the district court AND REMAND for further proceedings on that issue. We otherwise AFFIRM the judgment of the district court. Apportionment of costs is deferred until final judgment.

REVERSED in part, AFFIRMED in part, and REMANDED.

No. C-98 3245 CW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ZIMMERMAN, et al.,
Plaintiffs,

v.

CITY OF OAKLAND, et al.,
Defendants.

Filed March 24, 2003

ORDER GRANTING MOTION FOR RULE 11 SANCTIONS

Defendants Defendants Billy Taylor, Oakland Tow Car Association (OTCA), A&B Auto and Ken Betts' Towing (Towing Defendants) move for sanctions pursuant to Rule 11(b), Federal Rules of Civil Procedure, against Plaintiff Ronald Zimmerman and Plaintiffs' counsel Thomas E. Ho'okano. Plaintiffs oppose this motion. The matter was heard on December 13, 2002.

In a separate order granting Towing Defendants' and City Defendants' motions for summary judgment, this Court determined that Plaintiffs could not properly rely on the California Doe statute, California Civil Procedure Code § 474, to proceed on their State law claims against Towing Defendants because Plaintiffs were previously aware both of the identities of several Towing Defendants and the facts that gave rise to Plaintiffs' claims against these Defendants. On this

basis, the Court granted summary judgment in Towing Defendants' favor on the trespass, conversion and emotional distress claims against Ken Betts' Towing, Billy Taylor and A&B Auto.

Towing Defendants contend that Ho'okano failed to undertake a reasonable investigation of the relevant fact to determine whether Section 474 was available to his clients. As a result of this failure to investigate, Towing Defendants claim that they were forced to defend meritless claims, thereby incurring $46,787.50 in legal expenses.n1

As the Supreme Court has stated, "the meaning of . . . Rule [11] seems plain: A party who signs a pleading or other paper without first conducting a reasonable inquiry shall be sanctioned." Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 541 (1991). Courts have imposed sanctions in circumstances similar to those in this case. For example, a court in the Central District of California imposed sanctions against the estate of a plaintiff who sued the Los Angeles Sheriff's Department under 42 U.S.C. § 1983 because "reasonable investigation would have revealed that the § 1983 claim was barred by the statute of limitations." Estate of Blue v. County of Los Angeles, 120 F.3d 985 (9th Cir. 1997).

Rule 11 sanctions may be imposed on attorneys who violate its requirements and may consist of an order directing payment of some or all of the reasonable attorneys' fees incurred as a direct result of the violation. See Fed. R. Civ. P. 11(b),(c). However, the sanction imposed must be limited to what is sufficient to deter repetition of the sanctionable conduct or

comparable conduct my others similarly situated. See id. at 11(c)(2).

In this case, Plaintiffs' counsel failed properly to investigate the facts relevant to the availability of § 474 to his clients with regard to a number of their claims, in violation of requirements of Rule 11(b), Federal Rules of Civil Procedure. Plaintiffs argue that they were unaware of the relationship of the OTCA and the other Towing Defendants and that Plaintiffs' counsel was unaware of the relevant facts relating to Towing Defendants and Plaintiffs' causes of action against these Defendants. These arguments are unavailing. As Towing Defendants correctly point out, the relationship between OTCA and the other Towing Defendants is irrelevant to the trespass, conversion and emotional distress claims. Further, Plaintiffs' counsel's lack of actual knowledge of certain facts is not a defense to the imposition of sanctions, which may be imposed for the failure to conduct a reasonable investigation.

Here, Plaintiffs' counsel signed a declaration filed in support of Plaintiffs' motion to amend their complaint to substitute Towing Defendants for Doe Defendants. In this declaration, Plaintiffs' counsel stated, with regard to Defendant Ken Betts' Towing:

In September, 2001, I learned for the first time the identity of the towing contractor, proposed defendant Ken Betts' Towing. Mr. Betts' Towing Company actually towed the transit bus from the Zimmerman property on Chestnut Street in April, 1998.

However, at his June, 2002 deposition, Ronald Zimmerman testified that he was aware of the identity

of Ken Betts' Towing when his bus was towed in April, 1998:

Q: Do you recall whether there was a name of a company on the tow truck that did show up?

A: Oh, yes.

Q: What did it say?

A: Ken Betts' Towing.[n2]

Here, the only reasonable inquiry Plaintiffs' counsel had to perform to determine whether Ken Betts' Towing could be substituted for a Doe defendant under § 474 was to ask his client when he first learned who towed the bus.n3

At the hearing on this motion, Plaintiffs' counsel stated that he did not ask Ronald Zimmerman when he first learned who towed the bus prior to seeking to join Towing Defendants and that Ronald Zimmerman claimed no to know. Thus, either Plaintiff's counsel misinformed the Court, or Ronald Zimmerman misinformed his attorney who then failed to perform a reasonable investigation.

The Court imposes $10,000 in sanctions jointly and severally on Ronald Zimmerman and his attorney. These sanctions will be payable to Ken Betts' Towing within two weeks of the date of this order.

At the hearing, Plaintiffs' counsel asked that the Courts' order imposing sanctions be stayed for two weeks, apparently so that he and his client could

resolve who would pay for the sanctions. Ronald Zimmerman was not present at the hearing. If Mr. Zimmerman and his attorney are unable to resolve who will pay these sanctions, his attorney shall notify the Court within two weeks and the Court will hold an evidentiary hearing.

IT IS SO ORDERED.

Dated: March 24, 2003

CLAUDIA WILKEN
United Stated District Judge

Footnotes

n1 Attachment A to the declaration of George King in support of Towing Defendants' motion lists this figure as $48,737.50

n2 Ronald Zimmerman's deposition testimony also shows that he was aware of the facts upon which he would base his State law claims against Ken Betts' Towing:

Q: Did you speak to the driver?

A: I did.

Q: What did you say to the driver of the tow truck?

A: I cursed him and told him that he was stealing my bus which was being taken in variance with the ordinance. It was not – not only was it not in the ordinance, the grounds on which they seemed to be

taking it, but nobody announced any grounds. I said there had been no findings made as to what was wrong. "So when you take this, you are stealing my bus and I'm going to sue you and I'm going to get punitive damages against you and I fully intend to keep my word as of this moment and hereafter."

n3 Plaintiffs' counsel's declaration is more carefully worded with regard to the other Towing Defendants, stating that Plaintiffs' counsel was not previously aware of the "true relationship" between these defendants. Because Towing Defendants have not shown that this statement was false or shown that Plaintiffs' counsel should have been aware of the relationship between these Defendants, sanctions will not be imposed for Plaintiff' § 474 substitution of Defendants Billy Taylor, A& B Auto and OTCA.

No. C-98 3245 CW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ZIMMERMAN, et al.,
Plaintiffs,

v.

CITY OF OAKLAND, et al.,
Defendants.

Filed December 3, 2002

JUDGMENT

This action came on for hearing on motions for summary judgment filed by Defendants City of Oakland and Sergeant Leonard White (City Defendants) and Defendants Billy Taylor, Oakland Tow Car Association, A & V Auto and Ken Betts' Towing (Towing Defendants) before the Court, the Honorable Claudia Wilken District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that Plaintiffs take nothing, that the action be dismissed on the merits and that City Defendants and Towing Defendants recover of Plaintiffs their costs of action.

IT IS SO ORDERED

Dated: December 3, 2002

/s/
CLAUDIA WILKEN
United States District Judge

No. C-98 3245 CW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ZIMMERMAN, et al.,
Plaintiffs,

v.

CITY OF OAKLAND, et al.,
Defendants.

Filed December 3, 2002

ORDER GRANTING TOWING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants City of Oakland Sergeant Leonard White (City Defendants) move for summary judgment. Defendants Billy Taylor, Oakland Tow Car Association, A & B Auto and Ken Betts' Towing (Towing Defendants) have filed a separate motion for summary judgment. Plaintiffs Ronald Zimmerman and Steffi Zimmerman oppose these motions. The matter was heard on November 8, 2002. Having considered all of the papers filed by the parties and oral argument on the motions, the Court GRANTS Towing Defendants' motion as to all claims and GRANTS City Defendants' motion as to all claims.

BACKGROUNDn1

On March 3, 1998, Sergeant Leonard White, Police Service Technician (PST) Sylvia Carminer, PST Sandra Woodward and Officer Mark Thomas of the Oakland Police Department came to property owned by Plaintiffs Ronald and Steffi Zimmerman at 1089 26th Street, in Oakland, California (the 26th Street property). Officer Thomas placed a vehicle abatement tag on a 1966 GMC transit bus on the 26th Street property. Tags were also placed on other items on the property.

These tags stated in relevant part:

[N]o vehicle shall be parked on private property, public property or on roadway for more than 72 hours in an inoperable condition if it is visible to others . . .

The owner of the vehicle will be subject to a fine of $50 or more (depending on the type of violation).

- If the vehicle cannot be driven, you should arrange to have it towed.

- If it is not removed, it will be towed to a garage by the police and stored at the owner's expense . . .

Sergeant White is supervisor of the Traffic Division and the Vehicle Abatement Unit of the Oakland Police Department and supervises PST Carminer, as well as PST Jeffrey Haymon, who was not present at the 26th Street property on March 3. Plaintiffs have presented no evidence that Sergeant White supervised Officer

Thomas, who was coordinator of the Scofflaw Detail of the Oakland Police Department.

The 26th Street property is zoned for light industrial uses and Plaintiffs leased it to various vehicle repair and other businesses. It is a "commercial area" and "open to people who wished to transact business with tenants of the lot." Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

Following the tagging of the bus, on or around April 2, 1998, the Zimmermans received in the mail from the City a "Notice of Intention to Abate and Remove an Inoperable, Wrecked, Dismantled, or Abandoned Vehicle, or Parts Thereof, as a Public Nuisance" (April 2 Notice). This notice stated in relevant part:

Vehicles kept on private property which are visible to others must have current registration and must be driven twice weekly. Vehicles which are inoperable and/or unregistered and are visible on private property legally constitute a public nuisance and may be towed . . .

[Y]ou are notified of our intention to abate said nuisance by the removal of said vehicles (or parts of nuisance by the removal of said vehicles) 10 days from the date of mailing of this notice, unless the vehicles are brought into compliance or moved into an enclosed garage . . .

Any vehicle towed as a result of this complaint will be reduced to scrap or other final disposition consistent with the provision of 22661(f) [California Vehicle Code].

On or around April 7, 1998, Mr. Zimmerman telephoned PST Haymon of the Vehicle Abatement Unit and requested a public hearing to respond to the April 2 Notice. Two days later, Mr. Zimmerman received a notification that a public hearing would take place on his property at 1089 26th Street on April 23 at 1:00 p.m. On April 23, 1998, Sergeant White, PST Carminer, PST Haymon, Officer Daniel Hutchinson and Oakland City Attorney Charles Vose came to the property to conduct the public hearing requested by Plaintiffs. Sergeant White served as investigator and hearing officer at this proceeding, which began at approximately 1:30 p.m. and was videotaped by Officer Hutchinson.n2

Although the 26th Street property included warehouses and other buildings, Plaintiffs did not move the bus into any of these buildings after receiving the April 2 notice. The bus had no license plates at the time of the hearing. When, at Plaintiffs' requests, Plaintiffs' tenant Ruperto attempted to start the bus, the bus would not start. According to PST Haymon's deposition testimony, the bus's airline system, required to release the brakes and operate the bus was dismantled at the time of the hearing.

In her deposition, PST Carminer testified that she "called in" a vehicle identification number (VIN) given to her by an unspecified person at the hearing that she believed to be for the bus. According to PST Carminer's deposition testimony, when she called in the VIN, she learned that the bus was not registered.

During the hearing, Sergeant White ordered the bus to be towed. According to Sergeant White's deposition testimony, Sergeant White directed PST Haymon "to

call for a tow." When Mr. Zimmerman protested the towing of the bus, Sergeant White ordered Mr. Zimmerman not to interfere and threatened him with arrest when he protested again. Mr. Zimmerman asserts that he feared he would have a stroke or heart attack, feared for his life, and felt ill as a result of the City's actions.

PST Haymon testified at his deposition that he did not call Defendant A & B Auto, a corporation, to tow the bus because A & B Auto does not tow vehicles of the bus's size. A & B Auto is a member of Defendant Oakland Tow Car Association (OTCA), an unincorporated association which has a municipal towing contract with the City of Oakland. Instead, PST Haymon called Western Towing, also known as Western Messaging. Western Towing dispatched Defendant Ken Betts' Towing to the 26th Street property. Ken Betts' Towing towed the bus to a storage lot owned by A & B Auto. Plaintiffs have produced no evidence that the OTCA was called on April 23 to tow the bus. Nor have Plaintiffs produced evidence of a relationship between Western Towing and the OTCA. Ken Betts' Towing is not a member of the OTCA. Defendant Billy Taylor is an officer of A & B Auto and president of the OTCA.

The Zimmermans had acquired the bus from Steven Eurich. Eurich gave Ronal Zimmerman the bus in lieu of rent Eurich owed for space he rented at the 26th Street property. The Zimmermans assert that they spent approximately $15,000 of community property funds to refurbish and maintain the bus.

During some unspecified period in the past, the Jim Hines Foundation used the bust to carry out its activities such as transporting youth to sporting events and festivals. The Jim Hines Foundation maintains office space at the 26th Street property.

On August 24, 1998, Plaintiffs filed a complaint alleging that the Oakland Defendants violated various State laws and Plaintiffs' constitutional rights by tagging and towing the bus pursuant to Oakland's vehicle abatement ordinance. Various unnamed "Doe" defendants were also sued. On September 14, 1998, the Oakland Defendants filed a motion to dismiss Plaintiffs' complaint. Plaintiffs did not respond to the Oakland Defendants' motion to dismiss, but instead filed a First Amended Complaint (FAC) against City Defendants; requesting among other relief $2,360,000 for just compensation and $4 million in punitive damages.

This Court dismissed Plaintiffs' First Amended Complaint and entered judgment for the Oakland Defendants on April 15, 1999, finding, among other things, that Plaintiffs' post-deprivation remedies available under State and City law were constitutionally adequate.

On June 21, 2001, the United States Court of Appeals for the Ninth Circuit affirmed in par, reversed in part, and remanded to this Court to determine whether the notice and hearing procedures violated the Due Process Clause of the Fourteenth Amendment. Zimmerman v. City of Oakland, 255 F.3d 734 (9th Cir. 2001). On remand, Plaintiffs moved to file a second amended complaint, adding new claims and new defendants. On November 28, 2001, this Court issued an Order

granting Plaintiffs' motion for leave to file an amended complaint in part and denying it in part. Plaintiffs the filed a Second Amended Complaint (SAC) on December 3, 2001, substituting the Towing Defendants for Doe Defendants and making other amendments permitted by the Court.

On March 25, 2002, this Court issued an order that dismissed Steffi Zimmerman's claims with prejudice, dismissed with prejudice Plaintiffs' due process claims based on the alleged inadequacy of the April 2 notice and dismissed the Jim Hines Foundation's claims because the foundation was a suspended corporation unable to bring suit.

On October 15, 2002, this Court issued an order granting in part Plaintiffs' motion for reconsideration to allow Plaintiffs to file a Third Amended Complaint (TAC) that would restore due process claims by Steffi Zimmerman. Plaintiffs filed the TAC on October 28, 2002.

DISCUSSION

I. Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisneberg v. Ins. Co. of N. Am., 815 F.2d 1285, 128-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. Id.; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409(9th Cir. 1991), cert denied, 502 U.S. 994 (1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific evidence, through

affidavits or admissible discovery material, to show that the dispute exists." Bhan, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Celotex, 477 U.S. at 323.

II. Towing Defendants' Motion

The TAC includes claims against Towing Defendants for conspiracy to deprive Plaintiffs of their civil rights under 42 U.S.C. § 1983, conversion, trespass, intentional infliction of emotional distress and declaratory and injunctive relief related to these claims.

A. Statute of Limitations

Towing Defendants move for summary judgment arguing, inter alia, that Plaintiffs' claims against them are barred by the various applicable statutes of limitations. The statute of limitation for a § 1983 claim in California is one year. See McCoy v. City and County of San Francisco, 14 F.3d 28, 29 (9th Cir. 1994). The statute of limitation for trespass and conversion claims is three years. See Cal. Civ. Pro. Code § 338(b),(c). At all times relevant to this case, the statute of limitation for intentional and negligent infliction of emotional distress was one year. See Cal. Civ. Pro. Code § 340(3) (2002).n3

Because towing Defendants were substituted as defendants in the suit more than three years after the events that are the basis of Plaintiffs' claims occurred, Plaintiffs must rely on California Civil Procedure Code § 474, which allows for substitution of new parties for

Doe defendants for up to three years fro the commencement of an action in most circumstances,n4 to preserve their claims against Towing Defendants from being time-barred. See Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989).

Towing Defendants argue that Plaintiffs' reliance on § 474 is improper because Plaintiffs do not satisfy the requirements set forth in Optical Surplus, Inc. v. Superior Court, 228 Cal. App. 3d 776, 783 (1991), for substituting Doe for defendants.

Towing Defendants previously raised this issue in their January 28, 2002 motion to dismiss (Docket No. 61). In its march 25, 2002 order (Docket No. 82), this Court rejected Towing Defendants' arguments. Section 474 has been construed liberally to include instances not only of ignorance of a defendant's name, but ignorance of the facts giving rise to a claim against that defendant. See Optical Surplus, id. In its March 25 order, this Court stated that "Towing Defendants . . . failed to show that Plaintiffs were aware of the facts giving rise to their claims against the Towing Defendants when the original complaint was filed."

Towing Defendants claim that now that discovery is complete they are able to make the showing they were unable to make in support of their motion to dismiss. Ronal Zimmerman stated in his deposition that he knew the identity of Ken Betts' Towing:

Q: Do you recall whether there was a name of a company on the tow truck that did show up?

A: Oh, yes.

Q: What did it say?

A: Ken Betts' Towing.

Zimmerman's deposition testimony also shows that he was aware of the facts upon which he would base his State law claims against Ken Betts' Towing:

Q: Did you speak to the driver?

A: I did.

Q: What did you say to the driver of the tow truck?

A: I cursed him and told him that he was stealing my bus which was being taken in variance with the ordinance. It was not – not only was it not in the ordinance, the grounds on which they seemed to be taking it, but nobody announced any grounds. I said there had been no findings made as to what was wrong. "So when you take this, you are stealing my bus and I'm going to sue you and I'm going to get punitive damages against you and I fully intend to keep my word as of this moment and hereafter."

According his deposition testimony, Ronal Zimmerman also knew the identity of A & B Auto and was aware of the facts upon which he would base his State law claims against A & B Auto. When asked how he knew the bus would be at A & B Auto's lot, Ronald Zimmerman replied: "Because I asked that jerk from Ken Betts' place, 'Where are you taking this?' He says, 'We're taking it to A & B.'"

Ronald Zimmerman's deposition testimony shows that he likewise knew the identity of Billy Taylor and the facts upon which he would base his State law claims against Taylor.n5 At his deposition, Ronald Zimmerman testified about statement he made before the Oakland City Council approximately thirty days following the towing of the bus:

I remember that I was complaining that my bus was stolen in contravention of their own ordinance and that they were acting in a cavalier manner in disregard of my rights and I was very annoyed and I wanted my bus back and they were trying to hold me up for 3,000 bucks or something like that that Billy Taylor demanded to get back. I had a man go out there and look, I told them, at the bus sitting in the yard . . .

Plaintiffs may not rely on § 474 to save their State claims against Ken Betts' Towing, Billy Taylor and A & B Auto from the bar of applicable statutes of limitations. Plaintiffs' trespass,n6 conversion and emotional distress claims against these defendants are so barred.

B. State Law Claims Against OTCA

The only evidence Plaintiffs have produced with respect to the ORCA is its towing contract the City. This contract provided no support for Plaintiffs' trespass, conversion or emotional distress claims. Plaintiffs have presented no evidence that the OTCA was called to tow the bus, was present at the 26th Street property on April 23, or participated in these events in any way. Thus, Plaintiffs' State law claims against OTCA fail.

C. Section 1983 Conspiracy

The Ninth Circuit has held that "[t]o prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown." Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1985).

The Court having previously dismissed Plaintiffs' other constitutional claims, the only remaining constitutional basis for the alleged conspiracy is Plaintiffs' due process claim. Plaintiffs argue that the towing contract between the City and Towing Defendants and correspondence between Plaintiffs' counsel and the City Defendants' counsel regarding the bus and the towing storage charges incurred are evidence of a conspiracy between City Defendants and Towing Defendants to violate Plaintiffs' civil rights. Plaintiffs point to no provision of this contract that shows a common purpose to violate Plaintiffs' due process rights. Similarly, Plaintiffs cite no specific passages from the correspondence between counsel that would support their conspiracy claim. No intent to violate Plaintiffs' due process rights is apparent on the face of the towing contract or the correspondence. Plaintiffs present no other evidence of such a conspiracy. Accordingly, summary judgment must be granted in favor of Towing Defendants on the § 1983 conspiracy claims.

III. City Defendants' Motion

The TAC includes claims against both City Defendants for denial of due process in the City's vehicle abatement hearing procedures and conspiracy to deprive Plaintiffs

of their civil rights under 42 U.S.C § 1983. It includes claims against Sergeant White for intentional infliction of emotional distress and negligent infliction of emotional distress. It seeks declaratory relief against both City Defendants and injunctive relief against the City related to these claims.

A. Due Process Claim

Plaintiffs' TAC sets forth a lengthy recitation of the bases for their due process claim. Plaintiffs' allegation focus in particular in the relation between Sergeant White's presence at the 26th Street property at the time of the tagging of the bus on March 3 and his serving as hearing officer on April 23. Plaintiffs argue that this demonstrates bias.

The due process clause prevents the State from depriving a plaintiff of a prosecuted interest without "a fair trail in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). However, due process is a flexible standard. See Mathews v. Eldridge, 424 U.S. 319, 334-5 (1976). The Supreme Court has held that there is nothing inherently prejudicial in a hearing officer acting as both an investigator and a trier of fact. See Withrow v. Larkin, 421 U.S. 35, 53 (1975). Such an arrangement, without more does not demonstrate bias. Id. at 47.

Plaintiffs attempt to distinguish Withrow, arguing that Sergeant White was involved in the decision to tag the bus on March 3. However, apart from showing that Sergeant White was present at the 26th Street property on the day of the tagging, Plaintiffs have not presented any evidence of Sergeant White's actual

involvement in the tagging of the bus. The evidence shows that Officer Thomas tagged the bus and Plaintiffs have not presented any evidence, other than their unsupported assertions, to show that Sergeant White was Officer Thomas's supervisor or that Officer Thomas was acting under Sergeant White's direction when he tagged the bus.n7

Plaintiffs also argue that Sergeant White's failure to make formal findings at the hearing was a violation of their due process rights. Formal findings are not required where an adequate basis for the decision is apparent from the record. See United States v. Sesma-Hernandez, 219 F.3d 859, 861 (9th Cir. 2000). Here, Oakland Municipal Code Chapter 10.64.080 authorizes the abatement and removal of "abandoned, wrecked, dismantled, or inoperative" vehicles. It is clear from the videotape recording of the hearing that the bus did not start when Plaintiffs' tenant attempted to start the engine. According to PST Haymon's deposition testimony the bus's braking system was partially dismantled and inoperable at the time of the hearing. This, coupled with the fact that the bus had not been moved indoors since the tag had been affixed to it over six weeks earlier, was an adequate basis to abate and remove the bus as inoperative.n8 Accordingly, summary judgment in favor of City Defendants on Plaintiffs' § 1983 due process claim is granted.

B. Section 1983 Conspiracy Claim

The § 1983 conspiracy claims against City Defendants fail for the same reasons that these claims fail against Towing Defendants. See. II. C., supra.

C. Intentional and Negligent Infliction of Emotional Distress Claims

Plaintiffs' claims for intentional and negligent infliction of emotional distress against Sergeant White are based on the event that occurred on April 23, 2002. City Defendants argue that Sergeant White is immune from tort liability under these claims pursuant to state law. Plaintiffs to no respond to this argument in their opposition.

California Government Code § 821.6 states:

A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

See also Poppell v. City of San Diego, 149 F.3d 951, 970 (9th Cir. 1998). The evidence is undisputed that Sergeant White was a public employee who, on April 23, 1998, instituted an administrative proceeding at the 26th Street property in the scope of his employment. Accordingly, summary judgment must be granted in favor of Sergeant White on these claims.

CONCLUSION

For the foregoing reason, Towing Defendants' motion for summary judgment (Docket No. 118) is GRANTED as to all claims. City Defendants' motion for summary judgment (Docket No. 126) is GRANTED as to all claims. The Clerk shall enter judgment in favor of Towing Defendants and City Defendants to all claims.

Towing Defendants and City Defendants shall recover their costs.

Plaintiffs and City Defendants have also filed requests for judicial notice in support of their papers. Not having been opposed, these requests (Docket Nos. 128, 133) are GRANTED.

IT IS SO ORDERED

Dated: December 3, 2002

/s/
CLAUDIA WILKEN
United Stated District Judge

Footnotes

n1 Except where noted that an issue of fact is disputed, or that one party makes certain allegations or contentions, the facts below are undisputed.

n2 Plaintiffs object to the admissibility of the video tape of the proceeding as not properly authenticated pursuant to Rule 901, Federal Rules of Evidence. The video tape was attached as an exhibit to the declaration of Officer Hutchinson filed by City Defendants in support of their motion. In this declaration Officer Hutchinson states under penalty of perjury that he "reviewed the video tape . . . and [that] it is a true and accurate copy of the video tape he took on April 23, 1998." This is sufficient to authenticate the video tape pursuant to Rule 901. See, e.g., Saturn Manufacturing, Inc. v. Williams Patent Crusher & Pulverizer Co., 713 F.2d 1347, 1357 (8th Cir. 1983); United States v.

Oaxaca, 569 F.2d 518, 525 (9th Cir. 1978) Accordingly Plaintiffs' objection is overruled.

Plaintiffs further object to the video tape, claiming that the copy filed with the court has been "severely edited." In his declaration, Officer Hutchinson explains that "[t]here were times [during filming] that [he] turned off or paused the camera while people were standing around waiting, or when other activity on the property was occurring that did not involve the hearing." He further states that he "filmed the key events at the April 23, 1998 hearing, including the acts and statements of Mr. Zimmerman, Sgt. White, and others." The Court concludes that the video tape filed by City Defendants provides and adequate record of the April 23 hearing upon which to decide City and Towing Defendants' motions. Thus, this further objection is also overruled.

n3 This was recently extended to two years pursuant to 2002 Cal. Stat. 688, but is only retroactively effective for claims brought by "terrorist victims" as defined under the statute.

n4 In its March 25, 2002 order (Docket No. 82), this Court ruled that this three-year deadline was tolled pursuant to California Civil Procedure Code § 583.240 while this case was on appeal to the Ninth Circuit and therefore Plaintiffs' substitution of Towing Defendants for Doe defendants was not untimely.

n5 Towing Defendants also argue that Billy Taylor is not properly sued in this case. Towing Defendants point out that Taylor is a corporate officer of A & B Auto and Plaintiffs have made no showing of the factors

typically used to justify ignoring the corporate status of a corporation. See, Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1111 (9th Cir. 1979).

Plaintiffs respond that Taylor is also the president of OTCA an unincorporated association. Citing Frances T. v. Village Green Owners Assn., 42 Cal. 3d 490, 508 (1986), Towing Defendants reply that Taylor may not be held liable for the tortuous conduct of OTCA unless he "specifically authorized, directed or participated in this conduct." Plaintiffs have made no such showing. Thus, even if the claims against him were not time-barred, Taylor would be entitled to summary judgment on the State law claims against him for these reasons.

n6 Further, with regard to the trespass claim, the Ninth Circuit determined that the 26th Street Property was open to the public as a place of business. See Zimmerman v. City of Oakland, 255 F.3d at 740. "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong. A peaceable entry on land by consent is not actionable." Civic Western Corp. v. Zila Industries, Inc., 66 Cal. App. 3d 1, 16-7 (1977) (quotations omitted). Even if the trespass claims against Towing Defendants were not time-barred, they would fail as a matter of the law.

n7 Had Plaintiffs presented evidence that Sergeant White was involved in the tagging decision, Plaintiffs' due process claim might have been viable. Citing its previous decisions in Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court in Withrow noted that "when review of an initial decision is mandated, the decisionmaker must be other than the one who made

the decision under review." Withrow 421 U.S. at 58, n. 25. It explained that "[a]llowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present" under the facts of Withrow. Id.

n8 Declarations submitted by Plaintiffs in support of their opposition explain that the bus was equipped with a "stop switch," and anti-theft device, and that this switch was the reason that the bus could not be started during the hearing. One such declaration, by Plaintiffs' mechanic, Jim Montano, further state that "[t]o the best of [his] knowledge" the bus's braking system "was fully operational" at the time of the hearing. City Defendants correctly point out that such evidence regarding the merits of the abatement, submitted now for the first time, is irrelevant to Plaintiffs' § 1983 due process claim. At its essence, due process is the right to be heard. Crane v. Kentucky, 476 U.S. 683, 690 (1986). Plaintiffs have made no showing that they were prevented from presenting evidence regarding the stop switch or testimony from Jim Montano regarding the braking system at the hearing. Instead, they merely failed to do so.

No. C-98 3245 CW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ZIMMERMAN; et al.,
Plaintiffs,

v.

CITY OF OAKLAND, et al.,
Defendants.

Filed October 15, 2002

ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION IN PART

In its August 15, 2002 order (August 15 order), this Court granted the motion of Plaintiffs Ronald Zimmerman, Steffi Zimmerman, Jim Hines, and Jim Hines Foundation (hereinafter, Plaintiffs) for leave to file a motion for reconsideration of this Court's March 25, 2002 Order Granting in Part and Denying in Part Defendants' Motions to Dismiss Second Amended Complaint (March 25 order). The Court allowed Plaintiffs to seek reconsideration of the portion of the March 25 order that held that Plaintiff Steffi Zimmerman does not have standing to pursue due process claims against Defendants, and which dismissed Steffi Zimmerman's due process claims with prejudice. The Court stated that it was tentatively inclined to dismiss Steffi Zimmerman's due process claims with leave to mend instead of with prejudice, in order to permit Plaintiffs to amend their complaint to include an

allegation that Steffi Zimmerman has an ownership interest in the bus.

The August 15 order deemed Plaintiffs' motion for leave to file a motion for reconsideration to constitute their motion for reconsideration on the issue of Steffi Zimmerman's standing to pursue due process claims and the dismissal of those claims with prejudice. The Court allowed Defendants to file an opposition and Plaintiffs to file a reply. The parties have done so. Having considered all of the papers filed by the parties, the Court GRANTS Plaintiffs' motion for reconsideration in part.

In their opposition, Defendants argue that reconsideration of the Court's dismissal of Steffi Zimmerman's claims with prejudice should not be granted because Plaintiffs have not put forth any new evidence that would entitle them to such reconsideration. However, this is not the only basis on which reconsideration may be granted. The granting of reconsideration is a matter of discretion for a district court and is appropriate if the district court:

(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.

School District No. 1J, Multnomah County v. A C and S, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993); see also Local Rule 7-9(b) (setting forth the showing that must be made to obtain leave to move for reconsideration).n1

As Plaintiffs argue in their reply, the Federal Rules of Civil Procedure support liberality in the amendment of pleadings. Rule 15(a), Federal Rules of Civil Procedure, provides that leave of the court allowing a party to amend its pleading "shall be freely given when justice so requires." Leave to amend lies within the sound discretion of the trial court, which discretion "must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)(citations omitted). For this reason, Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality." Id; see also DCD Program, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (citations omitted).

Therefore, in light of the policy underlying Rule 15(a) and in the interests of justice, the Court GRANTS Plaintiffs' motion for reconsideration (Docket No. 83) in part. The portion of the March 25 order (Docket No. 82) dismissing Steffi Zimmerman's due process claims against Defendants with prejudice is vacated. Steffi Zimmerman's due process claims are instead dismissed with leave to amend, in order to permit Plaintiffs to amend their second amended complaint (Docket No. 60) to include an allegation that Steffi Zimmerman has an ownership interest in the bus.

Within ten days from the date of this order, Plaintiffs may file a Third Amended Complaint in accordance with this order. The Third Amended Complaint should also include technical corrections to make it clear that the conspiracy charge is against the City of Oakland, Sergeant White and the Towing Defendants. See August 15 order at 2, n. 1. Defendants' prior answers

may be deemed to be their answers to the Third Amended Complaint and Defendants' motions for summary judgment will be deemed to apply to Steffi Zimmerman.

IT IS SO ORDERED.

Dated: October 15, 2002

CLAUDIA WILKEN
United States District Court

Footnotes

n1 These three grounds are not exhaustive and reconsideration may also be granted in other, albeit "highly unusual," circumstances. School District No. 1J, 5 F.3d at 1263.

No. C-98 3245 CW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ZIMMERMAN; STEFFI ZIMMERMAN; JIM HINES; JIM HINES FOUNDATION, a non-profit California Corporation,
Plaintiffs,

v.

CITY OF OAKLAND, et al.,
Defendants.

Filed March 25, 2002

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendants Billy Taylor, Oakland Tow Car Association, A&B Auto and Ken Betts' Towing (collectively, Towing Defendants) and Defendants City of Oakland and Oakland Police Sergeant Leonard White (collectively, Oakland Defendants) move to dismiss Plaintiffs' Second Amended Complaint (SAC). The Oakland Defendants also request judicial notice of certain documents. Plaintiffs oppose the motions. The matter was heard on March 15, 2002. This Court having considered all of the papers filed by the parties and oral argument on the motion, the Towing Defendants' motion is DENIED (Docket No. 61), and the Oakland Defendants' motion is GRANTED in part and DENIED in part (Docket No. 62).

BACKGROUND

Plaintiffs allege that the City of Oakland wrongfully seized a bus owned by Plaintiff Ronald Zimmerman and dedicated to the exclusive use of the Jim Hines Foundation, in violation of Plaintiffs' constitutional rights. Plaintiffs allege this tortious seizure caused them various injuries. At the time of the seizure, the bus was parked on property owned by Plaintiffs Ronald and Steffi Zimmerman at 1089 26th Street, in Oakland. The property was zoned for light industrial use, which allows the storage of vehicles on the property. The Zimmermans were storing vehicles, including the bus, on the site in connection with an automotive repair business which is conducted there.

Plaintiffs allege that on March 7, 1998, Sergeant Leonard White and other members of the Oakland Police Department came to the 26th Street property without a search warrant and tagged various items on the property--including storage sheds, a fork lift, a cement block manufacturing machine, vehicles owned by employees working at the site, and the Jim Hines Foundation bus with notices that these items constituted nuisances and would be removed if not abated. Plaintiffs do not include a copy of the tag placed on the bus, but claim that it cited superseded provisions of the Oakland Municipal Code and did not provide any details as to why the bus was a nuisance or how it could be abated.

Following the tagging of the vehicles, on or around April 2, 1998, the Zimmermans received in the mail from the City a "Notice of Intention to Abate and Remove an Inoperable, Wrecked, Dismantled, or

Abandoned Vehicle, or Parts Thereof, as a Public Nuisance" (April 2 Notice). In pertinent part, the April 2 Notice indicates,

Vehicles kept on private property which are visible to others must have current registration and must be driven twice weekly. Vehicles which are inoperable and/or unregistered and are visible on private property legally constitute a public nuisance and may be towed.

The April 2 Notice does not cite any particular Oakland ordinance. The April 2 Notice does include a list of vehicles to which the Notice pertained, including the bus at issue in this case. The Notice does not list a Vehicle Identification Number (VIN) for the bus, and notes that there is no registered owner on file for that vehicle.

Plaintiffs contend that the bus was fully operational, not dismantled, abandoned, or wrecked. Plaintiffs do not make any representations about whether the bus was registered.

On or around April 7, 1998, Mr. Zimmerman telephoned Police Services Technician Jeffery Haymon at the Oakland Police Department Vehicle Abatement Unit and requested a public hearing to respond to the April 2 Notice. Two days later, Mr. Zimmerman received a notification that a public hearing would take place on his property at 1089 26th Street on April 23 at 1:00 p.m. Plaintiffs contend that on April 23, 1998, Sergeant White, who had tagged the vehicles, and Deputy City Attorney Charles Vose, came to the property to conduct the public hearing requested by Plaintiffs. According to Plaintiffs, Sergeant White served as a

pre-hearing investigator, hearing officer, and witness. Plaintiffs contend that no testimony was taken, no determinations or findings were made, and no order issued from the hearing officer to Mr. Zimmerman.

Plaintiffs contend that Sergeant White then ordered several vehicles seized, including the bus. Plaintiffs assert that Sergeant White did not explain why the vehicles were being seized or what condition required abatement, and made no findings about whether the vehicle had been driven within the previous seventy-two hours. Plaintiffs allege that when Mr. Zimmerman protested the seizure, Sergeant White ordered that Mr. Zimmerman not interfere and threatened him with arrest when he protested again. Mr. Zimmerman asserts that he feared he would have a stroke or heart attack, feared for his life, and felt ill as a result of the City's actions. Plaintiffs claim that when Mr. Zimmerman asked what he could do to redeem the bus, he was told there was nothing he could do. Plaintiffs further claim that when Mr. Zimmerman inquired as to who had complained about his property, he was informed that the City Council had registered the complaint. Plaintiffs allege that Mr. Zimmerman has been openly critical of the City Council in correspondence published in the Oakland Tribune and believes that the actions taken against him were retaliatory.

Following the hearing, the bus was allegedly towed to an unguarded vacant lot across the street from a storage yard owned by Defendant A&B Auto on G Street in Oakland. Plaintiffs allege that the bus was towed by Defendant Ken Betts' Towing at the direction

of Defendant Oakland Tow Car Association, a City contractor run by Defendant Billy Taylor.

Plaintiffs contend that they did not receive a written order or findings following the seizure. They contend that they made multiple requests for a hearing before the Oakland City Council to challenge the application of the Vehicle Abatement Ordinance and to make a facial challenge to Oakland's Anti-Blight Ordinance, but their requests were denied.

On August 24, 1998, Plaintiffs filed a complaint alleging that the Oakland Defendants violated various State laws and Plaintiffs' constitutional rights by tagging and towing the bus pursuant to the Vehicle Abatement Ordinance. On September 14, 1998, the Oakland Defendants filed a motion to dismiss Plaintiffs' complaint. Plaintiffs did not respond to the Oakland Defendants' motion to dismiss, but instead filed a First Amended Complaint, requesting among other relief $2,360,000 for just compensation and $4 million in punitive damages.

This Court dismissed Plaintiffs' First Amended Complaint and entered judgment for the Oakland Defendants on April 15, 1999, finding, among other things, that Plaintiffs' post-deprivation remedies available under State and City law were constitutionally adequate. On June 21, 2001, the United States Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded to this Court to determine whether the notice and hearing procedures violated the Due Process Clause of the Fourteenth Amendment. Zimmerman v. City of Oakland, 255 F.3d 734 (9th Cir. 2001). On remand, Plaintiffs moved to file a

second amended complaint, adding new claims and new defendants. On November 28, 2001, this Court issued an Order granting Plaintiffs' motion for leave to file an amended complaint in part and denying it in part. Plaintiffs then filed a Second Amended Complaint (SAC) on December 3, 2001, substituting the Towing Defendants for Doe Defendants and making other amendments permitted by the Court.

The Towing Defendants and Oakland Defendants now move to dismiss Plaintiffs' claims against them as alleged in the SAC.

DISCUSSION

I. Legal Standard

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Fidelity Fin. Corp. v. Fed. Home Loan Bank of S.F., 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12 (b) (6) motion See Durning v. First Boston Corp., 815 F.2d 1265 1267 (9th Cir. 1987).

Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901F.2d 696, 699 (9th Cir. 1988).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e). These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." Conley, 355 U.S. at 47. However, "conclusory allegations without more are insufficient to defeat a motion to dismiss." McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988); see also Smilecare Dental Group v. Delta Dental Plan, 88 F.3d 780, 785 n.6 (9th Cir. 1996) ; Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735-36 (9th Cir. 1987).

When granting a motion to dismiss, a court is generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, a court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to

amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. See id. at 296-97.

II. Towing Defendants' Motion to Dismiss

The Towing Defendants move to dismiss Plaintiffs' claims against them based primarily on the argument that the statute of limitations has run. Plaintiffs argue that the Towing Defendants, first named in the SAC filed December 3, 2001, have been substituted for Doe Defendants named in the original complaint, and therefore the claims against the Towing Defendants relate back to the filing of the original complaint, which was timely.

California's law, not Federal Rule of Civil Procedure 15(c), governs whether in a § 1983 action an amended complaint adding new parties relates back to the filing of the original complaint. See Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989); Lindley v. Gen. Elec. Co., 780 F.2d 797, 800-01 (9th Cir. 1986). In California, substitution of new parties for Doe defendants is allowed for up to three years from the commencement of the action. Cal. Civ. Proc. Code §§ 474, 583.210. Section 474 provides in relevant part:

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.

Plaintiffs filed the complaint in this action on August 24, 1998, and filed this motion to amend to add new parties on September 26, 2001, more than three years after the original complaint was filed. However, the three year period is tolled while the dismissal of the case was pending before the Ninth Circuit. California law provides:

In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed: . . . (b) The prosecution of the action or proceedings in the action was stayed and the stay affected service. . . . (d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control.

Cal. Civ. Proc. Code § 583.240. This provision tolls California's three year period while this case was on appeal to the Ninth Circuit, because service was impossible during that time, as this Court did not have jurisdiction. Therefore, absent some other deficiency in Plaintiffs' Doe pleading, the claims against the Towing Defendants relate back to the date of the original complaint and are timely.

The Towing Defendants argue that Plaintiffs cannot substitute them for the fictitiously-named Doe Defendants because Plaintiffs did not state any cause of action against the Doe Defendants in the original complaint. While it is true that parties may not be substituted for Doe defendants against whom no cause of action was stated in the original complaint, this requirement is not applied strictly. A recent California court explained:

Even if a plaintiff meets the other requirements of Doe pleading, an amended pleading will not relate back unless the original complaint set forth or attempted to set forth some cause of action against fictitiously named defendants. "It is not enough, of course, simply to name 'Doe' defendants. Rather, the complaint must allege that they were responsible in some way for the acts complained of." As another commentator explains, "Although the ironclad rule that the original complaint must contain charging allegations against the fictitious defendants may trap the unwary, compliance is relatively simple. The addition of 's' to 'defendant' in the charging allegations will suffice as long as the complaint does not limit the word 'defendants' to those sued by their correct names."

Winding Creek v. McGlashan, 52 Cal. Rptr. 2d 236, 240 (Ct. App. 1996) (internal footnotes and citations omitted). Here, Plaintiffs did use the term "defendants" generally in their original complaint, and did not specify which Defendants were named in each cause of action. Because of this, Plaintiffs did not fail to state a cause of action against the Doe Defendants in the original complaint.

The Towing Defendants also argue that Plaintiffs were not ignorant of the true identity of the Towing Defendants when the original complaint was filed, as required by § 474. The Towing Defendants point out that Plaintiffs were aware of the identity of Defendant A&B Auto because the original complaint mentions that "the bus was taken to the A&B Towing Yard situated on San Leandro Street." Complaint at 6. However, § 474 has been construed liberally to include instances not only of ignorance of a defendant's name,

but ignorance of the facts giving rise to a claim against a defendant. See, e.g., Gen. Motors Corp. v. Superior Court, 55 Cal. Rptr. 2d 871, 879-81 (Ct. App. 1996); Optical Surplus, Inc. v. Superior Court, 279 Cal. Rptr. 194, 197 (Ct. App. 1991).

The Towing Defendants have failed to show that Plaintiffs were aware of the facts giving rise to their claims against the Towing Defendants when the original complaint was filed. For instance, it appears that Plaintiffs were ignorant of the following facts until recently: that the Towing Defendants contract with the City of Oakland to provide towing services; that Defendant Oakland Tow Car Association did not have a business license with the City of Oakland; and that Defendant Billy Taylor has a relationship with Defendants Oakland Tow Car Association, A&B Auto and the City of Oakland. Plaintiffs appear to argue that because the Oakland Tow Car Association had no business license, it could not contract with the City of Oakland for towing services, creating a cause of action for conversion against all of the Towing Defendants, of which Plaintiffs were not aware until mid-2001.

The Towing Defendants also argue that substitution should not be permitted because the claims alleged against them in the SAC are different from those made in the original complaint, and therefore should not relate back. However, California liberally permits substitution of new parties for Doe defendants, even where new causes of action are alleged, as long as they arise out of the "same general set of facts." See, e.g., Austin v. Mass. Bonding & Ins. Co., 15 Cal. Rptr. 817, 820 (1961) ("A defendant unaware of the suit against him by a fictitious name is in no worse position if, in

addition to substituting his true name, the amendment makes other changes in the allegations on the basis of the same general set of facts."). The new causes of action alleged against the Towing Defendants arise out of the same general set of facts as those alleged in the original complaint against the Oakland Defendants. Therefore, Plaintiffs properly amended their complaint to state claims against the Towing Defendants, and these claims relate back to the date of the original, timely complaint.

Last, the Towing Defendants point out that Plaintiffs failed to serve at least three of them (Taylor, Oakland Tow Car Association and A&B Auto) within the time provided by this Court's November 28, 2001 Order for serving all Defendants. However, this procedural failure did not prejudice the Towing Defendants. Further, Plaintiffs served the Towing Defendants within the three Year period provided by California law, because the period was tolled while the action was on appeal to the Ninth Circuit Court of Appeals.

Accordingly, the Towing Defendants' motion to dismiss is DENIED. However, all claims by the Jim Hines Foundation are dismissed, because it is a suspended corporation unable to bring suit.n1

III. Oakland Defendants' Motion to Dismiss

The Oakland Defendants seek to dismiss each of the claims against them.

A. Due Process Claims

The Oakland Defendants argue that Plaintiffs' due process claims for violation of the Fourteenth Amendment, brought pursuant to 42 U.S.C. § 1983, should be dismissed, for several reasons.

1. Standing

First, the Oakland Defendants argue that no Plaintiff has a property interest in the bus in order to bring a due process claim for loss of the bus. However, the SAC alleges that Plaintiff "Ronald Zimmerman is the owner of a bus seized by the City of Oakland." SAC 9 ¶ 5. This allegation is sufficient to establish that Plaintiff Ronald Zimmerman has standing to assert a property interest in the bus.n2 However, no other Plaintiff is alleged to have a property interest in the bus. While Plaintiffs allege that the Jim Hines Foundation was permitted to use the bus, this does not create an ownership interest. A "beneficial interest" in the return of the bus does not confer standing to bring a due process claim, which requires a property interest or ownership interest in the bus. See, e.g., Greenwood v. FAA, 28 F.3d 971, 975 (9th Cir. 1994). Therefore, Plaintiffs Steffi Zimmerman,n3 Jim Hines and the Jim Hines Foundation may not bring due process claims against Defendants in this action. The due process claims may be asserted by Plaintiff Ronald Zimmerman only.

2. Preclusive Effect of State Administrative Hearing

The Oakland Defendants argue that Plaintiffs may not bring a § 1983 action for violation of constitutional

rights prior to exhausting their judicial remedies for review of an administrative hearing under State law. Because exhaustion is not required before bringing § 1983 claims, Patsy v. Bd. of Regents, 457 U.S. 496 (1982), this issue is better framed as whether the administrative hearing conducted by Sergeant White should be given preclusive effect because Plaintiffs failed to pursue a State judicial remedy.

The California Code of Civil Procedure provides for judicial review of final administrative determinations. Under § 1094.5 of the Code (writ of administrative mandamus), a State court may issue a writ of mandate setting aside an administrative decision. The Oakland Defendants contend that Plaintiffs may not bring this federal action for damages unless and until they have sought direct review of the administrative decision in State court. Because Plaintiffs did not seek to overturn through a writ of mandate the determination (after the administrative hearing conducted by Sergeant White) to seize the bus, the Oakland Defendants argue that the determination should be given preclusive effect in this litigation.

The Oakland Defendants rely on Miller v. County of Santa Cruz, 39 F.3d 1030 (9th Cir. 1994). In that case, the court affirmed a summary judgment ruling for the defendant in a § 1983 action on the grounds that the administrative ruling sustaining the plaintiff's dismissal had preclusive effect on the action pending in federal court. In Miller, the plaintiff was dismissed from his employment at the Santa Cruz County Sheriff's Department. He contested his dismissal before the Santa Cruz County Civil Service Commission. The Commission affirmed his dismissal after "a public

evidentiary hearing at which Miller was represented by counsel and was permitted to present oral and documentary evidence and to call witnesses." Miller, 39 F.3d at 1032.

California Code of Civil Procedure § 1094.5 provided Miller with an opportunity to seek judicial review of the Commission's decision in Superior Court. Miller declined to do so. Instead, he brought a § 1983 suit in federal court. The Ninth Circuit held that the unreviewed administrative determination precluded the plaintiff's § 1983 claim.

In its decision, the Miller court first noted that an administrative ruling is only entitled to preclusive effect when that proceeding "was conducted with sufficient safeguards 'to be equated with a state court judgment.'" Id. at 1033 (quoting Plaine v. McCabe, 797 F.2d 713, 719 (9th Cir. 1986)). Specifically, the court held that three distinct "fairness requirements" must be satisfied before a prior administrative ruling can bar a § 1983 suit. First, the administrative agency must act in a judicial capacity. Second, the agency must resolve disputed issues of fact properly before it. And, third, the parties must have had an adequate opportunity to litigate. Id. at 1033 (citing United States v. Utah Constr. & Mining, 384 U.S. 394, 422 (1966)). Absent an "adequate opportunity to litigate," administrative findings are not entitled to preclusive effect in federal court. See e.g. Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1283-84 (9th Cir. 1986) (no preclusive effect afforded to informal unemployment benefits hearing because the plaintiff did not have an adequate opportunity to litigate factual issues).

The "threshold inquiry" in a preclusion analysis in federal court, therefore, is whether the Utah Construction requirements have been satisfied. Miller, 39 F.3d at 1033. In Miller, however, the court found that "California had already adopted the Utah Construction standard." Consequently, the court looked only at "State preclusion law" to determine if the Commission's findings precluded federal claims as well. Id. The court concluded that a "California court would have accorded the determination preclusive effect." Id. Because the administrative determination was entitled to preclusive effect in California State courts, it was entitled to that same deference in federal court.

Based on Miller, the Oakland Defendants here argue that the hearing conducted by Sergeant White prior to seizing the bus is 'entitled to preclusive effect in this action. However, unreviewed administrative determinations, such as that of Sergeant White, will be given preclusive effect only when the fairness requirements of Utah Construction are met. See Misischia v. Pirie, 60 F.3d 626, 629 (9th Cir. 1995) (findings of administrative agencies must satisfy both Hawaii State requirements for preclusion and Utah Construction factors to have preclusive effect in federal court).

In the present case, Plaintiffs have adequately alleged that the requirements of Utah Construction have not been met. For purposes of this motion, the Court accepts the allegations in the SAC that Sergeant White reached his determination and seized the bus without testing any evidence through the adversarial process, and without making factual determinations or calling witnesses. Plaintiffs allege that Sergeant White was

biased and did not serve in a judicial capacity during the hearing. Plaintiffs were then denied a post-seizure review of the administrative hearing in front of the City Council. It is these facts that distinguish this case from Miller where the plaintiff was afforded a full evidentiary hearing, at which he was represented by counsel, presented evidence and called witnesses. Miller, 39 F.3d at 1032. The hearing procedure alleged by Plaintiffs did not afford Plaintiffs adequate opportunity to litigate and does not preclude Plaintiffs from bringing a § 1983 claim in federal court.n4

In short, based on their allegations, Plaintiffs did not have an adequate opportunity to litigate the seizure of the bus through the administrative hearing procedure, and they were not required to challenge the seizure determination through a writ of administrative mandamus. Because the writ procedure is effectively limited to the administrative record, it is an insufficient remedy when Plaintiffs allege that they were denied any opportunity to present their case at the administrative level. Although section 1094.5 may provide an adequate opportunity to challenge a procedurally flawed administrative hearing, it does not provide an adequate opportunity to challenge an administrative decision rendered without any process at all. Because Plaintiffs allegedly had no adequate opportunity to litigate before either Sergeant White, the City Council or the State court, the determination of Sergeant White does not satisfy the requirement for fairness set out in Utah Construction, 384 U.S. 394. It therefore does not have preclusive effect in this Court, and Plaintiffs need not have sought a writ of administrative mandamus in State court prior to bringing this § 1983 claim.

3. Due Process Claim Regarding Notice

Plaintiffs' first cause of action alleges that the April 2 Notice provided to Plaintiffs regarding the abatement of the bus was constitutionally inadequate and did not satisfy the requirements of due process. The Oakland Defendants argue that the April 2 Notice satisfied the due process requirements of the Fourteenth Amendment. n5

First, Plaintiffs claim that the April 2 Notice failed specifically to identify the condition or conditions of the bus which violated the municipal Vehicle Abatement Ordinance. However, the April 2 Notice states that "inoperable and/or unregistered" vehicles visible on private property constitute a public nuisance and maybe towed, and lists the bus as a vehicle that is a public nuisance, stating that a registered owner is not on file for the bus. This adequately notified Plaintiffs that the bus was considered a public nuisance because it was either unregistered n6 or inoperable, and visible on private property n7. Further, the April Notice is entitled "Intention to Abate and Remove an Inoperable, Wrecked, Dismantled, or Abandoned Vehicle, or Part Thereof, as a Public Nuisance." Therefore, Plaintiffs were on notice that the bus was going to be removed because it was inoperable, wrecked, dismantled or abandoned. The April 2 Notice need not identify which specific condition, of several claimed in the alternative, applies to the bus in order to satisfy due process requirements. Second, Plaintiffs argue that the April 2 Notice is constitutionally defective because it "fails to notify those entitled to a hearing of their rights under Section 10.64.100, Section 10.64.110, 10.64.120, and 10.64.130 of the City's Vehicle

Abatement Ordinance." SAC paragraph symbol 26. However, the April 2 Notice expressly states that Plaintiffs may request a public hearing. Plaintiffs in fact did so, and also requested a review before the City Council. To satisfy the Fourteenth Amendment's due process requirements, the April 2 Notice need not give Plaintiffs detailed information regarding their rights--it need only notify them of those rights. The April 2 Notice did so by informing Plaintiffs of their right to a public hearing. The April 2 Notice need not include details regarding the procedures for such a hearing and Plaintiffs' rights relating to that hearing. The fact that Plaintiffs in fact requested a public hearing, and later filed a request for review by the City Council, indicates not only that the April 2 Notice was adequate, but that Plaintiffs were not injured by any deficiency of the April 2 Notice on this basis.

Third, Plaintiffs argue that the April 2 Notice failed adequately to "inform them of the means by which they could avoid seizure of their property." SAC paragraph symbol 28. However, the April 2 Notice specifically states that the listed vehicles would be removed unless the "vehicles are brought into compliance or moved into an enclosed garage." Given that the April 2 Notice states that a violation consists of a vehicle that is either inoperable or unregistered and visible on private property, the April 2 Notice adequately informed Plaintiffs that they could correct the violation by either enclosing the bus in a garage (thereby making it not visible) or ensuring that the bus was operable and registered (thereby bringing it into compliance). The April 2 Notice adequately informed Plaintiffs how to correct the claimed violation, and is not constitutionally deficient on this basis.

Plaintiffs also argue that the bus should not have been removed for two reasons: (1) the April 2 Notice included "unregistered" vehicles in its definition of a public nuisance, whereas the Ordinance does not mention unregistered vehicles,. and (2) the bus is exempt from the Ordinance because its presence was "necessary to the operation of a lawfully conducted business or commercial enterprise" pursuant to Oakland Vehicle Abatement Ordinance § 10.64.030.B. Both of these arguments are substantive arguments regarding whether the bus was in fact a public nuisance, and do not have any bearing on whether the April 2 Notice provided to Plaintiffs was procedurally adequate under the Fourteenth Amendment's guarantee of due process.

The April 2 Notice sent to Plaintiffs is not constitutionally deficient and does not violate Plaintiffs' Fourteenth Amendment due process rights. The Oakland Defendants' motion to dismiss is GRANTED with prejudice as to Plaintiffs' due process claim based on inadequate notice.

4. Due Process Claim Regarding Hearing

The Oakland Defendants argue that the hearing conducted by Sergeant White prior to seizing the bus was constitutionally adequate under the Fourteenth Amendment. However, Plaintiffs' allegations are sufficient to survive a motion to dismiss on the issue of the adequacy of the hearing. Plaintiffs allege that Sergeant White, the hearing officer, was biased because he was also the officer who conducted the initial investigation of Plaintiffs' property, and served as a witness for the City as well as the trier of fact.

Plaintiffs also allege that Sergeant White arrived for the hearing at Plaintiffs' property with a tow truck present, indicating that he had already determined that he would seize Plaintiffs' property. Plaintiffs claim that Sergeant White did not make findings regarding the condition of the bus to support its seizure as a public nuisance, and did not render a written decision. Plaintiffs also allege that Sergeant White failed to inform Plaintiffs of their right to appeal under the City's Ordinance, and negligently informed them that the bus would be scrapped immediately. While any one of these deficiencies standing alone may not constitute a deprivation of due process rights, the combination of all of these allegations is sufficient to allege a constitutional violation.

For instance, it is not always a violation of due process for an investigator also to act as a hearing officer or trier of fact. See, e.g., Withrow v. Larkin, 421 U.S. 35, 52 (1975). However, Plaintiffs' allegations of Sergeant White's bias are sufficient to raise a constitutional question regarding the adequacy of the hearing procedures. See id. at 46 ("[A] 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'") (internal citations omitted). Plaintiffs' allegations that Sergeant White failed to make any findings or gather evidence also raise due process concerns. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("[T]he decision maker should state the reasons for his determination and indicate the evidence he relied on . . . .").

The Supreme Court pointed out in Mathews v. Eldridge: "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' . . . to insure that they are given a meaningful opportunity to present their case." 424 U.S. 319, 349 (1976) (quoting Goldberg, 397 U.S. at 268-69). Plaintiffs' allegations indicate that they were not given a "meaningful opportunity to present their case." Therefore, the Oakland Defendants' motion to dismiss the due process claim based on the inadequacy of the hearing is DENIED.

B. Conspiracy Claim

In response to the Oakland Defendants' motion to dismiss the conspiracy claim, Plaintiffs claim that the cause of action arises under 42 U.S.C. § 1985(3), though the claim was alleged as a § 1983 claim in the SAC: Section 1985(3), which provides a cause of action against any two people who deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," does not apply to any conspiracy to deprive a person of due process. "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). This is not the case here, so § 1985(3) cannot be the basis for the conspiracy claim. Therefore, the Court assumes that Plaintiffs are alleging a § 1983 conspiracy to deprive them of their due process rights.

A plaintiff may allege a § 1983 claim based on a conspiracy to deprive him of his constitutional rights so long as there has been an actual constitutional deprivation. See Cohen v. Norris, 300 F.2d 24, 27 (9th Cir. 1962); Minster v. Gates, No. 01-01867 CBM, 2001 WL 1112684, at *4 (C.D. Cal. Sept. 19, 2001). Under a § 1983 conspiracy theory, liability may be imposed on all participants in the conspiracy "without regard to who committed the particular act." Hale v. Townley, 45 F.3d 914, 920 (5th Cir. 1995). The conspiracy must be designed to deprive the plaintiff of his constitutional rights. See Spear v. Town of West Hartford, 954 F.2d 63, 68 (2d Cir. 1992).

Assuming that § 1983 is the basis for the conspiracy claim against the Towing Defendants, Sergeant White and the City, n8 Plaintiffs's allegations are adequate to survive a motion to dismiss. Two Ninth Circuit opinions have held that a private towing company, "acting at the behest of a police officer and pursuant to a statutory scheme designed solely to accomplish the state's purpose of enforcing its traffic laws, acts under color of state law for purposes of Section 1983." Goichman v. Rheuban Motors, 682 F.2d 1320, 1322 (9th Cir. 1982) (citing Stypmann v. City of San Francisco, 557 F.2d 1338 (9th Cir. 1977)). The Supreme Court has held private entities liable under 1983 for working jointly with a State actor. Seer e.g., Blum v. Yaretsky, 457 U. S. 991, 1004 (1982) (finding there must be a "sufficiently close nexus between the State and the challenged action of [the private defendants] so that the action of the latter may be fairly treated as that of the State itself."); United States v. Price, 383 U. S. 787, 794 (1966) "Private persons, jointly engaged with state

officials in the prohibited action, are acting 'under color' of law for purposes of [Section Symbol 1983] .").n9

Here, the Towing Defendants, though private actors, may be liable pursuant to § 1983 because they worked jointly and at the behest of the City. See Goichman, 682 F.2d at 1322.n10

Sergeant White is an agent of the City, and therefore cannot conspire with the City. Welsh v. City of San Francisco, No. C-933722 DLJ, 1995 WL 415127, at *3 (N.D. Cal. June 30, 1995) (municipality and its agents cannot form a conspiracy). If the Towing Defendants also acted as agents of the City, then none of the Defendants could be liable for conspiracy. See, e.g., Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 457 (9th Cir. 1979) ("[I]t is fundamental that an agent cannot conspire with his principal."). However, whether the Towing Defendants acted as agents of the City is a question of fact that cannot be resolve on this motion to dismiss.

Therefore, the Oakland Defendants' motion to dismiss conspiracy claim is DENIED.

C. State Law Claims for Intentional and Negligent Infliction of Emotional Distress

The Oakland Defendants contend that Plaintiffs' intentional al and negligent infliction of emotional distress claims are fatally defective under the California Tort Claims Act, Govt. Code §§ 900 et seq., because they were not timely "presented" to the City prior to filing the instant action.

In order to sue a public entity for property damage or personal injury, a plaintiff must first comply with the claims filing procedures set forth in Government Code section 900 et seq. A claim relating to a cause of action for personal injury must be presented within six months after the accrual of the cause of action. Cal. Govt. Code § 911.2. The cause of action accrues on the same date upon which it accrues for statute of limitations purposes. Cal. Govt. Code § 901. If a claim is required to be presented, no suit may be filed against the public entity unless and until a written claim has been presented and either acted upon or deemed rejected. Cal. Govt. Code § 945.4.; see Carlino v. L.A. County. Flood Control Dist., 13 Cal. Rptr. 2d 437, 440 (Ct. App. 1992).

Here, Plaintiffs filed the initial complaint in this suit in August, 1998, prior to filing a claim with the City of Oakland on September 28, 1998. The claim was denied by the City. The Oakland Defendants argue that because the claim was filed after this suit was initiated, Plaintiffs failed to follow the claim presentation requirements described above, and the State law claims should be dismissed.

Neither of the parties has cited a case directly on point. However, the cases cited by Plaintiffs persuade the Court that liberality in permitting State law claims is appropriate here, even though the claim presentation requirements were not completely satisfied before suit was brought. In Bahten v. County of Merced, in support of its holding permitting a case to proceed where a plaintiff had filed a complaint prior to the issuance of an order relieving the plaintiff of the claim presentation requirement, the court cited several cases

interpreting the claim presentation statute liberally and allowing prematurely-filed complaints. 130 Cal. Rptr. 539, 542-46 (Ct. App. 1976) (quoting Radar v. Rogers, 317 P.2d 17, 21 (Cal. 1957) ("[I]t would be highly technical to apply [the claim presentation statute] to bar this complaint, which was not filed too late but, at worst, prematurely. . . . The substance of the defect that the action had been brought before presentation and rejection of claim no longer existed when defendant by general demurrer to the amended and supplemental complaint sought to raise the issue.") and Savage v. State of California, 84 Cal. Rptr. 650, 652 (Ct. App. 1970) (noting the "attitude of the courts that procedural requirements should be given liberal interpretations in order not to deprive a litigant of his day in court because of technical requirements")).

In Cory v. City of Huntington Beach, the plaintiff submitted a timely government claim, then filed a civil complaint before the City Council had rejected his claim. The court adopted the "liberal view" expressed in cases such as Radar and Savage, applying the test of substantial compliance rather than strict compliance in government tort cases. 117 Cal. Rptr. 475 (Ct. App. 1974). The Cory court indicated that, absent a showing of any prejudice to the rights of the government entity, the government could not require strict compliance with the claim presentation statute, stating:

Id. at 478 (internal citations omitted).

Here, Plaintiffs filed an otherwise timely claim with the City of Oakland a month after filing the initial complaint in this case. In Plaintiffs' First Amended Complaint, filed October 2, 1998, Plaintiffs alleged that

they had filed a claim, though it had apparently not yet been denied by the City. In Plaintiffs' SAC, filed December 3, 2001, both the presentation and denial of the claim by the City are alleged. It is alleged that the SAC was filed within six months of the denial of the claim, though no evidence of the denial is before the Court. Under these circumstances, the Court views the requirements of California Government Code § 945.4 liberally, and will permit Plaintiffs' State law claims to go forward because of Plaintiffs' substantial compliance with the claim presentation requirements. The Oakland Defendants have not been prejudiced by the premature filing of the complaint in this action, because a claim has since been made and rejected, and the complaint has been amended to include such allegations.

The Oakland Defendants' motion to dismiss the sixth and seventh causes of action is DENIED.

D. Declaratory and Injunctive Relief

The Oakland Defendants move to dismiss Plaintiffs' claims for declaratory and injunctive relief because Plaintiffs cannot show a likelihood of future injury.

Plaintiffs must show a "likelihood of substantial and immediate irreparable injury" in order to seek injunctive relief against a government entity. Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1043 (9th Cir. 1999). The Ninth Circuit has pointed out that "the principles of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances." Id. at 1044; see also City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) ("The equitable remedy is unavailable absent a showing of

irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again--a 'likelihood of substantial and immediate irreparable injury.'"). Assuming Plaintiffs' allegations are true, they are sufficient to survive this motion to dismiss, for they allege the possibility of future harm.

Plaintiffs' declaratory relief claim may remain for the same reason. See Hodgers-Durgin, 199 F.3d at 1044 (applying same test to both injunctive and declaratory relief).

The Oakland Defendants' motion to dismiss the declaratory and injunctive relief claims is DENIED.

CONCLUSION

For the foregoing reasons, the Towing Defendants' motion to dismiss is DENIED (Docket No. 61). The Oakland Defendants' requests for judicial notice are GRANTED (Docket No. 63). The Oakland Defendants' motion to dismiss is GRANTED with prejudice in part and DENIED in part (Docket No. 62). Plaintiffs' due process claim based on inadequate notice is dismissed with prejudice as to all Defendants. Plaintiffs' due process claim based on-the adequacy of the hearing asserted by Plaintiffs Steffi Zimmerman, Jim Hines and the Jim Hines Foundation is dismissed with prejudice; only Plaintiff Ronald Zimmerman may assert this claim. All claims asserted by the Jim Hines Foundation are dismissed, because the Jim Hines Foundation may not bring suit. The remaining claims may be prosecuted.

IT IS SO ORDERED.

Dated: March 25, 2002

CLAUDIA WILKEN
United States District Judge

Footnotes

n1 The Court takes judicial notice of the fact that the Jim Hines Foundation is a suspended corporation in the State of California. See Def s' Request for Judicial Notice, Ex. A; Def s' Supplemental Request for Judicial Notice, Ex. A. The Oakland Defendants' requests for judicial notice are GRANTED, as the facts sought to be noticed are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

The Jim Hines Foundation therefore lacks capacity to bring suit, and may not be a plaintiff in this action. See e.g., Truck Ins. Exch. v. Superior Court, 70 Cal. Rptr. 2d 255, 259 (Ct. App. 1997).

n2 The Oakland Defendants claim that because Plaintiff Ronald Zimmerman permitted the Jim Hines Foundation to use and possess the bus, he no longer has a property interest in the bus. This is incorrect. The case relied upon by the Oakland Defendants is inapposite because it addresses the "dedication" of an easement, and appears to be limited to real property. See Friends of the Trails v. Blasius, 93 Cal. Rptr. 2d 193, 199 (Ct. App. 2000). As the Oakland Defendants point out, the interest provided to the Jim Hines Foundation "was nothing more than permission to use the bus." Oakland Def s' Mot. at 4 . Further, Blasius only states that an owner who "dedicates" property to

the use of another relinquishes his or her exclusive rights to that property. See id. Even if the law of dedication applied to property such as a bus, it would not eliminate Plaintiff Ronald Zimmerman's ownership interest.

n3 Plaintiffs state in their opposition that both Ronald and Steffi Zimmerman are owners of the bus. However, the relevant claims are those made in the SAC, wherein only Ronald Zimmerman i alleged to be an owner of the bus.

n4 Further, "an adequate opportunity to litigate" within the meaning of Utah Construction was not afforded to Plaintiffs by virtue of California's mandamus procedure under section 1094.5. Section 1094.5 does not provide an opportunity for a petitioner to present additional evidence in support of a writ. "The general rule is that a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." Pomona Valley Hosp. Med. Center v. Superior Court, 63 Cal. Rptr. 2d 743, 747 (Ct. App. 1997); Rapp v. Napa County Planning Comm'n, 22 Cal. Rptr. 643 (Ct. App. 1962) (in an administrative mandamus proceeding, the court's sole function is to determine from a review of the record whether there is sufficient evidence to sustain the administrative body's ruling). Where the administrative agency did not act in a judicial capacity, no adversarial process was conducted, no testimony was taken and no evidence was presented (as Plaintiff alleges was the case here), review of the administrative record is insufficient to provide an adequate opportunity to litigate.

In fact, in Mata v. City of Los Angeles, 24 Cal. Rptr. 2d 314, 319 (Ct. App. 1993), the California Court of Appeal held that a "mandamus proceeding is technically not regarded as an action at all. It is, instead, described as a special proceeding" deserving of no preclusive effect. Based on the nature of the proceeding afforded by § 1094.5, the Ninth Circuit has held that even a final determination on a writ petition does not bar a § 1983 claim. "Because the state proceeding was a mandamus action, the ordinary claim preclusion rules that bar parties from relitigating claims already decided by courts on the merits do not apply here." Honey v. Distelrath, 195 F.3d 531, 533 (9th Cir. 1999). In Honey, the district court dismissed a § 1983 action brought by a dismissed public employee. The district court held that the plaintiff's successful petition for a writ of administrative mandamus precluded her § 1983 claim for deprivation of procedural due process. The Ninth Circuit reversed, holding that the writ proceeding had no preclusive effect and reinstating the plaintiff's claim. 195 F.3d at 534.

n5 The April 2 Notice at issue was not attached to the SAC, but was attached to the First Amended Complaint. Therefore, the Court can consider the April 2 Notice on a motion to dismiss.

n6 Plaintiffs argue that the April 2 Notice only states that no registered owner could be found for the bus. The April 2 Notice states, in relation to the bus: "Registered Owner not on File." Plaintiffs are correct that there is no proof that the bus was actually unregistered. Even if the April 2 Notice contained no information regarding the bus' registration status, it would be constitutionally sufficient, for it states that

vehicles are a public nuisance when they are "inoperable and/or unregistered." This provides sufficient notice to Plaintiffs of the reasons for the proposed seizure of the bus.

n7 Plaintiffs claim that the term "visible to others" is unconstitutionally vague. It is not. The April 2 Notice makes clear that Plaintiffs may abate the nuisance by putting the bus in an enclosed garage.

n8 The Oakland Defendants point out that the only party other than the Towing Defendants that is named in the conspiracy charge is the Oakland City Council, which is no longer a party to this action. Therefore, the SAC does not allege a conspiracy against any of the Oakland Defendants. However, it appears that this was an error on the part of Plaintiffs, who claim they intended to name the City of Oakland as a conspirator. Further, the conspiracy claim includes Defendant Sergeant White in the caption, though not in the text. Plaintiffs have asserted that this omission was unintended as well. Instead of requiring Plaintiffs to amend their complaint again, the Court will assume that the conspiracy allegations were made against both the City of Oakland and Sergeant White, as well as the Towing Defendants.

n9 Section 1983 addresses only those injuries caused by State actors or those acting under color of State law. Rendell-Baker v. Kohn, 457 U.S. 830, 835 (1982). A private defendant may beheld liable only as "a willful participant in joint activity with the State or its agents." Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (quoting United States v. Price, 383 U.S. 787, 794 (1966)).

n10 "To state a claim against a private entity on a § 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act." Spear, 954 F.2d at 68. "In final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.'" Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, (1982)); see also Conway v. village of Mount Kisco, 750 F.2d 205, 214 n.12 (2d Cir. 1984) ("[P]rivate litigants engaged in a conspiracy with state officials to violate the Fourteenth Amendment are amenable to a cause of action under § 1983--whether as state actors by virtue of conspiratorial conduct with state officials, or as private actors who, acting in conspiratorial concert with state actors, thereby act under color of law."), reaff'd, 758 F.2d 46 (2d Cir. 1985).

[I]n assessing the formal adequacy of a claim, courts have applied a test of substantial compliance. Similarly, where the statutory purpose has been realized by other means, strict compliance has not been required. We could not allow the city to prevail here without being guilty of the kind of legalistic myopia which brings the law into disrepute. Even assuming that the city gave serious consideration to plaintiff's claim rather than merely turning it over to its insurer, the city could not have been prejudiced by the premature filing of the action since the complaint was not served until the time period had run. Thus the defect had ceased to exist before the city was even formally notified that suit had been brought. To call the city's defense "highly technical" would not be an overstatement.

No. C-98 3245 CW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONALD ZIMMERMAN; STEFFI ZIMMERMAN; JIM HINES; JIM HINES FOUNDATION, a non-profit California Corporation,
Plaintiffs,

v.

CITY OF OAKLAND, et al.,
Defendants.

Filed November 28, 2001

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Plaintiffs Ronald Zimmerman, Steffi Zimmerman, Jim Hines, and the Jim Hines Foundation (hereinafter, Plaintiffs) move for leave to file a Second Amended Complaint (SAC) under Federal Rule of Civil Procedure 15(a). The matter was heard on November 2, 2001. Having considered all of the papers filed by the parties and oral argument on the motion, Plaintiffs' motion for leave to amend (Docket No. 53) is GRANTED in part and DENIED in part, for the reasons stated at the hearing, as follows: Plaintiffs may amend to allege Fourteenth Amendment due process claims as to the inadequacy of both the notices and the hearing, but Plaintiffs may not make allegations that the notices were insufficient under State law n1;

Plaintiffs may add proposed new Defendants Oakland Tow Car Association, A&B Auto, Billy Taylor and Ken Betts' Towing n2; Plaintiffs may add a new Section 1983 conspiracy claim; Plaintiffs may add a conversion claim; Plaintiffs may allege State intentional and negligent infliction of emotional distress and trespass claims; Plaintiffs may not substitute new City Council Members and may not include any individual Council Members in the amended complaint, because Defendant City of Oakland can provide the relief they seek; Plaintiffs may allege amended declaratory and injunctive relief claims and an amended prayer for relief to conform to the claims they are allowed to make in their amended complaint.

Plaintiffs may file a Second Amended Complaint in accordance with this Order on or before December 7, 2001, and serve it on all Defendants on or before January 7, 2002. Defendants must answer or file a motion to dismiss by January 28, 2002, which shall be noticed for hearing on March 1, 2002. A case management conference will be held on March 1, 2002, at 10:00 a.m., whether or not a motion is filed. A case management statement will be due one week prior to the conference.

IT IS SO ORDERED.

Dated November 28, 2001

CLAUDIA WILKEN
United States District Judge

Footnotes

n1 This does not mean that Plaintiffs cannot cite State law to argue, for instance, that the notices violated the Fourteenth Amendment's Due Process Clause by failing to notify those entitled to a hearing of their rights under various State laws.

n2 California's law, not Federal Rule of Civil Procedure 15(c), governs whether in a Section 1983 action an amended complaint adding new parties relates back to the filing of the original complaint. See Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989); Cabrales v. County of L.A., 864 F.2d 1454, 1463-64 (9th Cir. 1988). In California, substitution of new parties for Doe defendants is allowed for up to three years from the commencement of the action. Cal. Civ. Proc. Code §§ 474, 583.210. Plaintiffs filed the complaint in this action on August 24, 1998, and filed this motion to amend to add new parties on September 26, 2001, more than three years after the original complaint was filed. Plaintiffs argue that the three year period should be tolled while the dismissal of the case was pending before the Ninth Circuit. California law provides:

In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed: . . . (b) The prosecution of the action or proceedings in the action was stayed and the stay affected service. . . . (d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control.

Cal. Civ. Proc. Code § 583.240. Though not briefed by the parties, it appears that this provision may toll California's three year period while this case was on appeal to the Ninth Circuit. Because Plaintiffs' tolling argument is plausible, amendment to add new parties is not futile and will be allowed. Similarly, amendment to add new claims against the new parties will be allowed in the absence of clear proof of futility. The new parties may address these issues more thoroughly on a motion to dismiss the claims against them.

No. 03-15067
D.C. No. CV-98+03245-CW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD SIMMERMAN; STEFFI ZIMMERMAN; JIM HINES; JIM HINES FOUNDATION, a non-profit California Corporation,
Plaintiffs-Appellants,

v.

OAKLAND, CITY OF; LEONARD WHITE, Sergeant; BILLY TAYLOR; OAKLAND TOW CAR ASSOCIATION; A&B AUTO; KEN BETTS' TOWING,
Defendants-Appellees.

Filed March 22, 2004

ORDER

Before: GOODWIN, TASHIMA, and CLIFTON, Circuit Judges.

Appellants' first amended petition for rehearing is DENIED.